

COMMENT

WAIVER, CERTIFICATION, AND TRANSFER OF JUVENILES TO ADULT COURT: LIMITING JUVENILE TRANSFERS IN TEXAS

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* St. Mary's University School of Law, Candidate for Juris Doctor, May 2011; Trinity University, San Antonio, Texas, B.A. American Politics, 2002. I hope this Comment inspires others to remember our collective responsibilities to children in confinement. I am deeply grateful to my husband, Ian, for his unending love and support. Special thanks to Professor Stephanie Stevens for inspiring me to write on this important topic. Finally, I extend my sincere appreciation to *The Scholar: St. Mary's Law Review on Minority Issues* Editorial Board and staff, for all of their work in preparing this piece for publication.

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I. INTRODUCTION

In 2007, the Dallas Morning News and the Texas Observer broke the story of a sex abuse scandal at the remote West Texas State School in Pyote, Texas.¹ The news stories revealed that officials had ignored complaints of sexual abuse of juvenile detainees for at least two years, even after a Texas Ranger's investigation substantiated the charges.² The allegations included charges that inmates of the Texas Youth Commission (TYC), as young as eleven years-old, were sexually abused by detention supervisors.³ Responding to public outcry, the Texas State Legislature passed Senate Bill 103, aimed at reforming the TYC,⁴ the state agency responsible for juvenile corrections.⁵ One provision of the bill lowered

1. Doug J. Swanson, *Sex Abuse Reported at Youth Jail: Complaints About Staffers Ignored, Covered Up, Investigation Reveals*, DALLAS MORNING NEWS, Feb. 18, 2007, available at 2007 WLNR 3240905; Nate Blakeslee, *Hidden in Plain Sight*, TEX. OBSERVER, Feb. 23, 2007, at 6, available at 2007 WLNR 5413044.

2. Doug J. Swanson, *Sex Abuse Reported at Youth Jail: Complaints About Staffers Ignored, Covered Up, Investigation Reveals*, DALLAS MORNING NEWS, Feb. 18, 2007, available at 2007 WLNR 3240905.

3. Alex Branch, *Audit Cites Texas Youth Commission Improvements*, FORT WORTH STAR-TELEGRAM, May 6, 2009, at B2, available at 2009 WLNR 8554749 (describing 2007 Texas legislative actions after the sexual abuse scandal was revealed). While TYC has failed to comply with directives to hire more certified sex offender counselors, the commission has improved its processing of mistreatment allegations. *Id.* A spokesperson for TYC explained that, due to the shortage of sex offender counselors in Texas, the positions are hard to fill. *Id.* TYC is training its own employees to earn the necessary certification and fill these vacancies. *Id.* The agency has implemented most of the forty-seven recommendations suggested by auditors in 2007. *Id.*

4. Act of June 8, 2007, 80th Leg., R.S., ch. 263, § 53, 2007 Tex. Gen. Laws 449 (current version at TEX. HUM. RES. CODE ANN. § 61.084(e) (West Supp. 2010)).

5. *Mission Statement and Guiding Principles*, TEX. YOUTH COMM'N <http://www.tyc.state.tx.us/about/mission.html> (last updated Feb. 22, 2010) (outlining the mission of the TYC, which includes "promot[ing] public safety by operating juvenile correctional

the age limit for TYC inmates from twenty-one to nineteen.⁶ Consequently, once a juvenile reaches the age of nineteen, the minor can no longer be held in a TYC juvenile detention facility, and must be discharged either through release or transfer to the Texas Department of Corrections.⁷ The rationale behind the lowered age limit was reducing the number of juveniles being held at TYC facilities;⁸ however, according to juvenile justice advocates, the reduced age limitation is responsible for the recent rise in Texas juveniles certified to be tried and sentenced as adults.⁹ Significantly, the transfer rate in Texas has risen by 22% in the last two years.¹⁰ As a result of the lowered age limit, prosecutors who believe there is an inadequate amount of time to work with young offenders within the juvenile justice system seek certification more often.¹¹

Should Texans be alarmed by the jump in the number of juveniles who are standing trial as adults? I answer that question in this Comment with a resounding “yes.” Transfer, sometimes called “certification” or “waiver,” is not only detrimental to the minor, who is treated by the legal system as an adult, but is also harmful to society as a whole.¹² Youths

facilities and by partnering with youth, families, and communities to provide a safe and secure environment.”).

6. Act of June 8, 2007, 80th Leg., R.S., ch. 263, § 53, 2007 Tex. Gen. Laws 449 (current version at TEX. HUM. RES. CODE ANN. § 61.084(e) (West Supp. 2010)).

7. TEX. HUM. RES. CODE ANN. § 61.084(e) (West Supp. 2010).

8. House Comm. on Corrections, Bill Analysis, Tex. S.B. 103, 80th Leg., R.S. (2007) (indicating two methods for lowering the number of young people committed to the TYC: lowering the age limit from twenty-one to nineteen and prohibiting youth who commit misdemeanors from being held at TYC facilities).

9. Lisa Sandberg, *More Juvenile Offenders Landing in Actual Prison*, SAN ANTONIO EXPRESS-NEWS, Feb. 23, 2009, at 13A, available at 2009 WLNR 3502417 (discussing the rise in the number of juvenile offenders who are certified to stand trial in adult criminal court). Juvenile justice advocates believe adult prison settings cannot meet the needs of young offenders. *Id.*

10. *Id.* (providing state-wide and county-specific transfer rates). In 2008, Bexar County experienced a 75% jump in the number of youth certified from the previous year. *Id.* Tarrant County certified almost triple the number of youths in 2008 as it did in 2007. *Id.*

11. *Id.* (explaining why transfer rates are increasing). Describing the mentality of prosecutors, Bexar County Chief Juvenile Prosecutor Jill Mata characterizes the age limitation as leaving prosecutors “with no option but to certify [young offenders] as adults.” *Id.*; House Research Org., Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009) (acknowledging that since the passage of Senate Bill 103 in 2007, “[p]rosecutors now tend to seek to certify some 16- and 17-year-old offenders as adult offenders because the lowered age cap for TYC allows detention in juvenile facilities only for two or three years.”).

12. Helen M. Alvarez, *A Common Theme*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 5 (2008) (discussing a November 2007 survey by the Centers for Disease Control that found treating young offenders like adults at both trial and sentencing phases appears to be more detrimental to juveniles and society than the practice of treating young offenders within the juvenile justice system). Specifically, the survey found that the overall effect of

who are incarcerated with adults are more likely to be physically and sexually victimized, more likely to commit suicide, and more likely to re-offend upon their release than are youths who serve time for similar crimes in juvenile detention facilities.¹³ Juveniles incarcerated with adults cannot avail themselves of the therapeutic, rehabilitative, and educational opportunities that exist in the juvenile system.¹⁴ During critical stages of identity development, juveniles locked up with adults form distorted views of their identities and tend to feel rejected by society, learning anti-social behaviors from the inmates around them.¹⁵ Furthermore, juveniles emerging from adult prisons must deal with the stigma of a felony conviction, which often precludes them from obtaining educational loans and meaningful jobs.¹⁶

Successful rehabilitation of youth within the juvenile justice system is possible. This is true even for youth who commit serious crimes.¹⁷ Texas is the home of the Capital Offender Program (COP), described by the Office of Juvenile Justice Prevention and Delinquency as a “model program” for its success in reducing recidivism for youth who complete the five-month program.¹⁸ While COP handles a relatively small number of

transferring young offenders to the adult system was an increase in the violence rates among those juveniles. *Id.*

13. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4, 10 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

14. *See* CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf (noting that adult jails do not provide the necessary educational and programming services that are essential to a young person’s healthy development); MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 5: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT 4 (2010), http://www.adjj.org/downloads/3582issue_brief_5.pdf (outlining the reasons why significant differences exist for youths held in juvenile correctional facilities and youths held in adult prisons). Despite the legal requirements for jails to provide education to youth, few jails comply. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

15. Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 184 (2007).

16. *Id.*

17. TEX. YOUTH COMM’N, SPECIALIZED CORRECTIONAL TREATMENT (2007), http://www.tyc.state.tx.us/programs/special_treat.html#capital.

18. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 66 (2009), <http://www.utexas.edu/lbj/news/images/file/>

juveniles each year,¹⁹ the success of the program illustrates that rehabilitating delinquent youth through state-funded programs is not simply an idealistic hope—it is a genuine reality. Young people are more malleable and susceptible to intervention, therapy, and treatment than adults.²⁰ Indeed, this notion is the principle upon which the juvenile justice system was founded.²¹ Texas would best serve its own interests if, instead of allowing more juveniles to move into adult court, money was allocated to expand exemplary programs such as COP and youth were kept within the juvenile justice system.

I offer three straightforward reforms to Texas law that aim to reduce transfer levels and ensure that when a juvenile is transferred to adult court, the justice system has operated fairly. First, the 2007 change lowering the age limitation for youth incarcerated by the Texas Youth Commission must be reversed, and youths must instead remain under the jurisdiction of the TYC until they reach twenty-one years of age. This change will lead to decreased transfer rates because prosecutors will seek

From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf (describing the Giddings State School, run by the Texas Youth Commission). COP began in 1988 as a treatment program for youths who were incarcerated for homicide. *Id.* The Texas Youth Commission's website provides the following information on the Capital and Serious Violent Offender Program:

The Giddings State School operates a Capital and Serious Violent Offender Treatment Program for youths that are committed for murder, capital murder, and if the offense involved the use of a weapon or deadly force. The program helps these young people connect feelings associated with their violent behavior and to identify alternative ways to respond when faced with risky situations in the future. Participants in this program are required to reenact their crimes and to play the role of both perpetrator and victim.

The Giddings Capital and Serious Violent Offender Program has gained worldwide attention and been featured on several national news programs. It is one of TYC's most promising specialized treatment programs. Research shows that participation in this program reduced the likelihood of being re-incarcerated for any offense by 55 percent, and for a felony offense, by 43 percent.

Specialized Correctional Treatment, TEX. YOUTH COMM'N, http://www.tyc.state.tx.us/programs/special_treat.html#capital (last updated Sept. 14, 2007).

19. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, *FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM* 66 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf> (noting "[t]he program takes up to five months to complete" and "[o]nly eight or nine youth are enrolled in the program at a time").

20. Adam Caine Ortiz, *Juvenile Death Penalty: Is It "Cruel and Unusual" in Light of Contemporary Standards?*, 17 CRIM. JUST. 21, 21 (2003) (asserting the common sense notion that of all people who commit crimes, juveniles are the "most amenable to treatment and rehabilitation").

21. Wallace J. Mlyniec, *The Special Issues of Juvenile Justice: An Introduction*, 15-SPG. CRIM. JUST. 4, 4 (2000).

transfer less often when more time is allotted for TYC to work with a young person.²² Second, judges must be required to make individual findings for a juvenile during a transfer hearing, and a judge must be required to write out all of these findings without the aid of a pre-printed form. Texas law is already written in such a way as to suggest meaningful and individualized consideration is required during certification hearings,²³ but actual practice reveals some courts use pre-printed check-box forms, and judges sign off on transfer decisions without fully considering the circumstances of each young offender.²⁴ Finally, a juvenile must be able to file an interlocutory appeal immediately after a transfer hearing, *before* adult criminal trial. Prior to 1995, an appeal following a transfer hearing was allowable, but the law changed as Texas moved to “get tough” on juvenile crime.²⁵ Allowing an immediate interlocutory appeal will support evenhandedness in the transfer process. These changes are in line with the recent trend in juvenile law in Texas. The Texas legislature expressed its desire to make the transfer process “as fair as possible” by the passage of a 2009 law allowing defense attorneys five days instead of one day to inspect the evidence that will be used at a juvenile’s certification hearing.²⁶ The reforms I suggest will further the goal of fairness in the transfer process.

22. House Research Org., Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009).

23. TEX. FAM. CODE ANN. § 54.02(f) (West Supp. 2010) (listing the four factors that a judge is required to consider during a transfer hearing). The factors are:

(1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (2) the sophistication and maturity of the child; (3) the record and previous history of the child; and (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.

Id.

24. Chris Vogel, *For Their Own Good*, HOUSTON PRESS, May 28, 2009, available at 2009 WLNR 10693190 (providing an extensive overview of the problems resulting from certifying teens as adults in Texas, including the inability to appeal after a certification hearing until after the criminal trial, the lack of individual findings required by judges during a certification hearing, and in Harris County, the policy of holding certified juveniles in solitary confinement twenty-three hours a day in adult jail for their “own safety”).

25. See House Research Org., Bill Analysis, Tex. H.B. 327, 74th Leg., R.S. (1995) (“[R]evis[ing] the juvenile justice system to expand the offenses that can be punished by a determinate . . . sentence, lower the age at which juveniles can be tried as adults, establish a statewide juvenile records system and establish guidelines for a progressive sanctions model for juvenile offenses.”).

26. Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009) (“Because of the reduction in age, prosecutors may seek more adult certifications, particularly with 16-year-old or 17-year-old offenders”).

Although the juvenile system is far from perfect, the adult criminal justice system is astoundingly worse for juveniles who commit crimes.²⁷ A common theme in this Comment is that the underlying principles upon which the juvenile justice system was founded remain viable and worthy goals, and Texas law should reflect that understanding.

Part II traces the development of juvenile justice in this country, including the evolution of the first American juvenile courts, and summarizes the due process rights afforded to juveniles by the U.S. Supreme Court.

In Part III, I argue juvenile transfers to adult court should be limited in Texas by highlighting the scientific, sociological, and psychological research that exists on adolescents, with a special emphasis on young peoples' development, decision-making and reasoning abilities, and the resulting insights the research provides into the process of judging juveniles' culpability. Part III also addresses the Supreme Court case of *Roper v. Simmons*.²⁸ The reasoning in *Roper* lends support to the contention that juveniles should be treated separately from adults.²⁹

Part IV contains three specific reforms to Texas law that will significantly improve the delivery of fundamental elements of juvenile justice: individual consideration, rehabilitation, and treatment. I argue for the need for written, individualized findings during transfer hearings, the importance of the opportunity for immediate appeal of a certification order, and a reversal of the 2007 amendment lowering the age limit for TYC inmates from twenty-one to nineteen.

This Comment concludes with the assertion that transferring juveniles to adult court is only appropriate in rare and exceptional situations. Texas must revisit the idea of juvenile transfer and financially prioritize rehabilitation for youths. The policy of treating juveniles like adults fails both the juvenile and the public.

27. RANDALI G. SHELDEN, *DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY* 344 (2006) (outlining the increased victimization rates among juveniles imprisoned in adult facilities and the increased "social costs" of locking away youth with adults).

28. 543 U.S. 551, 578–79 (2005) (ruling that the imposition of the death penalty for a person who committed the offenses before the age of eighteen constitutes cruel and unusual punishment).

29. Helen M. Alvare, *Symposium on Youth and the Law: Foreword: A Common Theme*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 4 (2008) (asserting that the reasoning in *Roper* provides strong persuasive force that juveniles should receive mitigated sentences due to their youth).

II. FROM *PARENS PATRIAE* TO "DO AN ADULT CRIME, DO ADULT TIME": THE DEVELOPMENT OF AMERICAN JUVENILE JUSTICE

A. *Emerging Justice*

Understanding the modern juvenile court system requires a look back at the origins and development of juvenile justice law in the United States. By the end of the fourteenth century, the English common law started recognizing infancy and immaturity as viable defenses to criminal acts.³⁰ Children younger than seven were immune from criminal sanctions.³¹ With few exceptions, laws in the colonial United States paralleled the English common law.³²

The doctrine of *parens patriae* largely influenced American juvenile justice in the United States from the late nineteenth century through the middle part of the twentieth century.³³ In medieval England, *parens patriae* was a form of property law allowing the king to oversee the estates of landed orphans.³⁴ As "father" of the country, the king assumed the role of legal caretaker of "his" people, particularly those unable to care for themselves.³⁵ In the modern context, *parens patriae*, "parent of [the] country,"³⁶ encompasses the idea that youths are not capable of criminal

30. DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 12 (Marilyn McShane & Frank P. Williams III, eds., 2001) (tracing the law's treatment of children from English common law to the early American colonial period).

31. *Id.* (describing the common law rules for children who committed crimes).

32. *Id.* (acknowledging that common law principles influenced how early American law viewed the legal responsibility of children). In colonial America, a rebuttable presumption existed that children between seven and fourteen years of age lacked any criminal capacity, and infancy and immaturity were not allowable defenses for any child over the age of fourteen because the law viewed those children as adults. *Id.*; Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 804 (2003) (tracing the history of the treatment of children under the law).

33. Akira Morita, *Juvenile Justice in Japan: A Historical and Cross-Cultural Perspective*, in A CENTURY OF JUVENILE JUSTICE 360, 360 (Margaret K. Rosenheim et al. eds., 2002) (noting that Japanese juvenile law borrowed and selectively assimilated the concept of *parens patriae* from the United States). Morita claims the rehabilitative ideals of early American juvenile courts strongly influenced Japanese juvenile law, but over time, the two systems evolved in opposite directions. *Id.* at 360–61. The trend in the United States moved toward accountability and punishment, while Japan continued to stress rehabilitation and protection. *Id.* at 361.

34. RANDALL G. SHELDEN, DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY 18 (2006) (tracing the roots of the concept of *parens patriae* to the chancery courts of medieval England).

35. *Id.* (describing the role of the King of England as the guardian of orphaned children).

36. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). *Parens patriae* is defined as "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, [especially] on behalf of someone who is under a legal disability to prosecute the suit." *Id.*

intent; thus, the government must provide them with protection, guidance, and rehabilitation.³⁷ Under this principle, the state stands as a "substitute parent" for children who have engaged in unlawful conduct.³⁸ Put another way, *parens patriae* is the idea that in handling young offenders, the state should focus not on punishment, but rather employ protective measures to ensure the child is rehabilitated.³⁹

At the end of the nineteenth century, a series of reform movements arose in reaction to the massive social change in the United States resulting from widespread industrialization, immigration, and urbanization.⁴⁰ Juvenile courts came into existence during a time when the existing American "values and institutions seemed incapable of supporting a new developing social structure."⁴¹ In the mid-1820s, reformers began creating houses of refuge for children,⁴² now viewed as precursors to the development of a distinct juvenile justice system in the United States.⁴³ Houses of refuge exclusively held children, most of whom were not committed for criminal offenses.⁴⁴ The houses of refuge are alternatively described by scholars as "poorhouses," with the goal of preventing children

37. M.A. BORTNER, *INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE* 1-2 (1982) (summarizing the goals of traditional juvenile justice philosophies in the United States).

38. *Id.* at 4 (1982) (describing the motivations of the reformers who promoted the first juvenile courts). Reformers recognized the societal concern with delinquent children; the concept of *parens patriae* as applied to juvenile justice created an avenue for far-reaching involvement in troubled children's lives. *Id.*

39. Akira Morita, *Juvenile Justice in Japan: A Historical and Cross-Cultural Perspective*, in *A CENTURY OF JUVENILE JUSTICE* 360, 361 (Margaret K. Rosenheim et al. eds., 2002).

40. M.A. BORTNER, *INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE* 2 (1982) (providing an explanation for the origins of juvenile courts and a snapshot into the late nineteenth century social state of the United States).

41. *Id.* (describing one of the new social problems as "youthful misbehavior").

42. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 46 (Margaret K. Rosenheim et al. eds., 2002) (outlining the link between the houses of refuge and the reformers of the late nineteenth century). The two major groups of reformers during this time were the Progressives and the Jacksonians. *Id.* The Jacksonians seemed to favor institutionalization of children in houses of refuge, which often amounted to "nothing more 'than [] mini-prison[s] for children.'" *Id.* While Progressive reformers did not fully embrace the concept of houses of refuge, the Progressives did credit the Jacksonian reformers with "firmly establishing the principle that the state had a responsibility toward its children (*parens patriae*) and its corollary that youthful offenders should be housed separately from adult criminals." *Id.*

43. DAVID L. MYERS, *EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER* 12 (Marilyn McShane & Frank P. Williams III, eds., 2001) (noting that the houses of refuge are frequently associated with the development of the juvenile justice system).

44. *Id.*

from turning into adult “paupers,”⁴⁵ or as reform schools, akin to “mini-prison[s].”⁴⁶ Courts routinely placed juveniles who had committed no criminal acts into houses of refuge without providing juveniles with due process rights.⁴⁷ Consequently, these placements raised constitutional questions.⁴⁸ The need for a “new legal mechanism” for juveniles became clear as the nineteenth century drew to a close.⁴⁹

In 1899, Chicago created the first juvenile court in the United States.⁵⁰ The court was charged with hearing cases of “neglected, dependent, or delinquent children under the age of 16.”⁵¹ The new court allowed for judicial discretion in choosing between punishment or individual treatment and rehabilitation.⁵² The concept of a separate court for children

45. *Id.*

46. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 46 (Margaret K. Rosenheim et al. eds., 2002).

47. DAVID L. MYERS, *EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER* 12 (Marilyn McShane & Frank P. Williams III, eds., 2001).

48. *Id.*

49. *Id.* (noting that the lack of due process that was associated with the houses of refuge contributed to the belief that a new and separate system was needed for young offenders).

50. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 42 (Margaret K. Rosenheim et al. eds., 2002) (detailing the development of the first juvenile courts and the individuals who led the movement). The “Act for the Treatment and Control of Dependent, Neglected and Delinquent Children,” passed the Illinois General Assembly on the final day of the legislative session, and formed the Cook County Juvenile Court. *Id.* Lucy Flower and Julia Lathrop led the efforts to create this court, in order to have children who had committed crimes heard in a separate court from adults. *Id.* Flower and Lathrop were instrumental in helping the new court begin to operate by raising money and assisting with the operation of a detention home. *Id.* at 50. Lucy Flower, a philanthropist and reformer, suggested that the Chicago Woman’s Club create a new organization, named the Juvenile Court Committee (JCC), and charged it with managing a detention home and the compensating fifteen probation officers. *Id.* Once the JCC was established in 1903, Julia Lathrop was chosen as the committee’s first president. *Id.*

51. MICHELE DEITCH ET AL., *THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM* 5 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf> (providing a brief history of juvenile justice in the United States from the nineteenth century to present).

52. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 42 (Margaret K. Rosenheim et al. eds., 2002). Aside from individual treatment and rehabilitation, the original juvenile court in Chicago was also based on the idea that judges, considering individual children, could best decide whether a child’s case should be heard in juvenile or adult court. Wallace J. Mlyniec, *The Special Issues of Juvenile Justice: An Introduction*, 15-SPG. CRIM. JUST. 4, 4 (2000).

quickly caught on, and by 1925, forty-six states had established juvenile courts.⁵³ Despite the widespread use of juvenile courts, America's early juvenile justice system was characterized by a lack of uniformity, differing age limits defining jurisdiction, varying rules of procedure, and discrepancies in the types of children who were supervised by the courts.⁵⁴ The overarching justification and aim for the juvenile courts, however, was generally agreed upon:⁵⁵ to discover the root causes of the child's bad behavior and intervene in such a way as to prevent the child from engaging in more serious criminal activity in the future.⁵⁶

The juvenile courts adopted an interventionist approach, reflected in the way language was used to clarify the distinction between juvenile court and criminal adult court.⁵⁷ This distinction still exists today, and the terminology used by each court reflects that separation.⁵⁸ For example, "adjudication" is the juvenile system's version of a trial in adult court.⁵⁹ Juveniles are not "convicted," they are "adjudicated delinquent."⁶⁰ Similarly, they are not found "guilty," but "in violation of the

53. DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 14 (Marilyn McShane & Frank P. Williams III, eds., 2001) (explaining the emergence of the "rehabilitative ideal," and the manner in which juvenile courts employed various strategies to positively influence young people's behavior).

54. *Id.* (stating that in addition to a lack of uniformity, a relaxed approach existed with regard to due process and procedural rules). The individuals who created the juvenile court envisioned the court as a place where the child would be sheltered, hearings would be closed, confidential records would be kept, and neither private attorneys nor juries would participate in the legal process. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 43 (Margaret K. Rosenheim et al. eds., 2002).

55. *See* DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 14 (Marilyn McShane & Frank P. Williams III, eds., 2001).

56. *Id.* (describing the theoretical underpinnings of early juvenile proceedings).

57. *See id.* (discussing the development of a "distinct language" for juvenile court proceedings).

58. *See* RANDALL G. SHELDEN, DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY 334 (2006) (comparing proceedings in juvenile and adult courts); *see also* M.A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 38 (1982) (outlining the two main proceedings in juvenile court: adjudication and disposition, which are roughly equivalent to the guilt and sentencing stages in adult court).

59. RANDALL G. SHELDEN, DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY 334 (2006) (comparing the terms and procedures used in juvenile and adult courts). Depending on the jurisdiction, the adjudication hearings can range from quite informal, to as formal as an adult criminal trial. *Id.*

60. M.A. BORTNER, INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE 5 (1982) (exploring the theoretical distinctions that serve to separate the juvenile system from the adult criminal justice system).

juvenile code.”⁶¹ Accordingly, juveniles are considered “delinquent” instead of “criminal.”⁶² The adjudicatory hearing is considered the fact-finding portion of the juvenile process, while the dispositional hearing is the rough equivalent to the sentencing phase in adult court.⁶³ Juvenile court is categorized as a civil—not a criminal—proceeding.⁶⁴

Juvenile courts operated without major constitutional challenges to their approaches until the middle of the twentieth century.⁶⁵ Critics of the juvenile justice system began to voice opposition to the informal and largely discretionary procedures used by juvenile courts during the 1950s and 1960s, resulting in a variety of due process challenges eventually addressed by the Supreme Court during the “due process revolution.”⁶⁶

B. *The “Due Process Revolution”*

In the 1966 case of *Kent v. United States*,⁶⁷ the Supreme Court extended several important due process rights to juveniles relating specifically to the transfer process.⁶⁸ The Court in *Kent* held a juvenile is entitled to a

61. *Id.*

62. *In re Gault*, 387 U.S. 1, 22–23 (1967) (noting that the difference in the terminology used in juvenile courts as compared with adult courts is touted as one of the significant benefits of the unique juvenile system). Unfortunately, the difference in stigma between “delinquent” and “criminal” is almost imperceptible. *Id.* at 23–24.

63. RANDALL G. SHELDEN, *DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY* 334 (2006).

64. M.A. BORTNER, *INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE* 5 (1982) (analyzing the contributions of positivistic criminology and scientific social work to the emergence of the juvenile justice system as a unique and separate system).

65. DAVID L. MYERS, *EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER* 15 (Marilyn McShane & Frank P. Williams III, eds., 2001).

66. *Id.* at 15–16 (outlining the criticisms directed against the juvenile system during the 1960s).

67. 383 U.S. 541 (1966) (analyzing the due process protections that a juvenile is entitled to receive under the Constitution). Morris Kent, a sixteen year old, was arrested for robbery and rape after fingerprints found in the victim’s apartment were matched to prints taken from him when he was fourteen years old. *Id.* at 543–44. He was interrogated by the police for seven hours, during which time he admitted to the offenses. *Id.* Because Kent was sixteen years old at the time, the District of Columbia Juvenile Court had exclusive jurisdiction over him. *Id.* at 543. Kent was detained for nearly a week without arraignment. *Id.* at 544–45. Although Kent’s attorney filed a motion for a hearing on whether the juvenile court would waive jurisdiction over Kent, the juvenile court judge held no hearing and instead entered an order waiving jurisdiction without making any findings. *Id.* at 545–46.

68. *Id.* at 557 (“The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment.”).

hearing to determine waiver of juvenile court jurisdiction, as well as a judicial statement explaining the reasons for the waiver, if waiver is granted.⁶⁹ Further, *Kent* held counsel for a juvenile must be given access to social records and similar reports that the judge will consider during the waiver hearing.⁷⁰

In re Gault,⁷¹ argued before the Supreme Court in the same year as *Kent*, again extended due process rights for juveniles.⁷² The Court held, in cases in which the juvenile could be confined, notice must be provided "sufficiently in advance of scheduled court proceedings," describing the alleged misconduct with reasonable specificity.⁷³ *Gault* also held, in a proceeding in which the juvenile's freedom is in question, the juvenile and his or her parents must be informed of the juvenile's right to representation, and counsel must be appointed if the child cannot afford an attorney.⁷⁴ Furthermore, the Court held the privilege against self-incrimination applies to juveniles and, in the absence of an authentic confession,

69. *Id.* (holding that before a juvenile court can validly waive jurisdiction over a juvenile, due process affords the juvenile the right to a hearing and the right to counsel). The Court held that the juvenile's attorney must have access to the social records, probation reports, or other reports which the juvenile court will consider at the hearing. *Id.* Furthermore, the juvenile court must state the reasons for the court's decision. *Id.* The statement of reasons from the juvenile court need not be formal or include "conventional findings of fact"; however, the statement must show that the question of waiver was carefully considered. *Id.* at 561.

70. *Id.* (acknowledging the importance of the waiver decision). In reviewing the original purposes of the juvenile courts, the Court noted the questions that had recently arisen as to whether juvenile courts were equipped with the resources to sufficiently fulfill the role of the state as *parens patriae*. *Id.* at 555–56. The court went on to note that, "[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Id.* at 556. The Court noted the quandary of children in the juvenile system, but declined to rule on constitutional guarantees which would apply to an adult in *Kent*'s situation. *Id.*

71. 387 U.S. 1 (1967).

72. *Id.* at 57. Gerald Gault, a fifteen year old, was arrested in Arizona for making a lewd telephone call to a neighbor. *Id.* at 4. Gerald's parents were not notified of his arrest, and once a petition was filed with the court, the Gaults did not receive service of the petition. *Id.* at 5. At the habeas corpus hearing, the neighbor who had made the allegations of the lewd phone call neither appeared nor testified. *Id.* at 7. Due to the neighbor's absence, Gerald was not identified at the hearing as the voice of the caller. *Id.* After the hearing, the judge committed fifteen year old Gerald to the State Industrial School, "for the period of his minority." *Id.* In Arizona, a juvenile's minority lasted until he or she was twenty-one years old. *Id.* The referral report, filed by the probation officers and never disclosed to the Gaults, listed the charge against Gerald as "Lewd Phone Calls." *Id.*

73. *Id.* at 33 (rejecting the Supreme Court of Arizona's reasoning regarding notice). The Court quipped, "[b]eing a boy does not justify a kangaroo court." *Id.* at 27–28.

74. *Id.* at 41 (explaining that when a juvenile's freedom is at stake, due process mandates a right to counsel).

a juvenile cannot be committed to a state institution if there is no sworn testimony during a determination of delinquency since no meaningful opportunity for cross-examination exists.⁷⁵

Following *Gault*, the Supreme Court continued the course of extending due process to juveniles. The 1970 case of *In re Winship*⁷⁶ held, in adjudicatory hearings, the standard of proof required for juveniles to be adjudicated delinquent (the equivalent of a criminal conviction) is proof beyond a reasonable doubt, rather than a preponderance of the evidence.⁷⁷ In *Breed v. Jones*,⁷⁸ the Supreme Court extended the protection against double jeopardy to juveniles, holding, prior to any determination of guilt of the juvenile, the juvenile court must determine whether to transfer a juvenile to adult court, thereby waiving jurisdiction.⁷⁹

The trend of extending due process rights to juveniles did not last.⁸⁰ In *McKeiver v. Pennsylvania*, the Court held, in 1971, the Constitution does not require that juveniles be afforded the right to a jury trial during the adjudicative stage.⁸¹ The Court expressed a reluctance to alter the “intimate” juvenile proceeding by requiring jury trials for juveniles and thus turning the juvenile system into a completely adversarial process.⁸²

After *McKeiver*, the Court, in the 1979 case *Bellotti v. Baird*, succinctly explained its justifications for concluding that the constitutional rights afforded to children and adults are not equal: “the peculiar vulnerability of

75. *Id.* at 55, 57 (extending the protections of the Fifth Amendment to juveniles). The Court acknowledged issues will arise with regard to waiver of a child's privilege, however, the Court insisted that while technique might vary from jurisdiction to jurisdiction, the principle of the privilege will remain constant. *Id.*

76. 397 U.S. 358 (1970).

77. *Id.* at 365–66, 368 (“The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child.”). The Court considered the requirement of proof beyond a reasonable doubt just as important as the constitutional safeguards discussed in *Gault*. *Id.* at 368.

78. 421 U.S. 519 (1975).

79. *Id.* at 535–36 (stating that extending the constitutional safeguard against multiple trials will not diminish the flexibility and informality of the juvenile system).

80. Gerald P. Hill, II., *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FL. COASTAL L. REV. 143, 153 (2008).

81. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (noting that despite the failings of the juvenile court to achieve their original goals, the Court will not flatly hold all constitutional rights afforded to adults as applicable to juveniles). The Court explained that although the U.S. Constitution does not guarantee a juvenile the right to a jury, states are free to “experiment” and may allow juries for juveniles however the State chooses. *Id.* at 547.

82. *Id.* The reluctance to completely equate juveniles with adults reflects a commitment by the Supreme Court to the separation between children and adults under the law. This commitment is important when one considers the appropriateness of moving young offenders into adult courts and prisons. The Supreme Court has consistently asserted juveniles are special and different from adults.

children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”⁸³ These reasons have been relied upon by the Supreme Court and others time and again to explain why particular constitutional protections do not apply to minors.⁸⁴ The reasons articulated in *Bellotti* provide insight into the struggle for balance in the juvenile justice system. Children are different: they are special, vulnerable, and immature. Legislators have tried to both protect children and hold them accountable, but lawmakers sometimes pass reactionary legislation in response to public outcry over “out of control” youth.⁸⁵ Current transfer laws serve as examples of misguided and counterproductive legislation.

C. Juvenile Transfer

Since the inception of juvenile courts in the United States, judges had the power to transfer cases to adult court, if they determined the charge was serious enough.⁸⁶ When a child is transferred to adult court, the juvenile court transfers its jurisdiction, or “waives” it, to the adult criminal justice system.⁸⁷ This process is frequently called “certification” or “waiver.”⁸⁸ Until recently, the transfer of a juvenile to adult criminal

83. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (analyzing the validity of a Massachusetts statute that required an unmarried minor to obtain parental consent before receiving an abortion).

84. *E.g.*, *Qutb v. Strauss*, 11 F.3d 488, 492 n.6 (5th Cir. 1993) (citing *Bellotti*, 443 U.S. at 634).

85. See generally Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267 (1999) (discussing the constitutionality of government-imposed juvenile curfews as a means to deter criminal activity and protect juveniles from victimization).

86. DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 14–15 (Marilyn McShane & Frank P. Williams III, eds., 2001) (discussing the Cook County juvenile court process of transferring older boys to adult courts and the fact that by transferring the more notorious juvenile cases, the critics of the courts were held at bay).

87. RANDALL G. SHELLEN, DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY 341 (2006) (noting that transfer is a rapidly growing change in juvenile justice). Transfer may occur because the juvenile court views the youth as too dangerous or “not amenable to treatment.” *Id.* All states have laws allowing juvenile transfer to adult court. *Id.* Several states have no minimum age in place for transfer, while others allow transfer for children between the ages of ten and fourteen to adult court in certain circumstances. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 24–26 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf> (listing each of the fifty states and the state policy on juvenile transfer to adult court).

88. RANDALL G. SHELLEN, DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY 341 (2006).

court was a rare occurrence, and most young people remained in the juvenile system.⁸⁹ But then, in response to a “much publicized juvenile ‘crime wave’” during the late 1980s and early 1990s, most states changed their laws to enable the transfer of juveniles to adult courts.⁹⁰ “Since 1992, forty-five states have passed or amended legislation making it easier to prosecute juveniles as adults.”⁹¹ Consequently, the number of youths in adult jails increased by 208% from 1990 to 2004.⁹² As law professor Helen M. Alvare stated, “The opportunity cost of this outcome was fewer juveniles receiving the benefits of the rehabilitation programs offered in the juvenile justice system.”⁹³ Citing some of the problems with this change, Professor Alvare continued, “in adult prisons—dubbed by some as ‘crime schools’ for juveniles—minors were more likely to be abused, and even to commit suicide, than were minors sent to juvenile programs.”⁹⁴ Interestingly, crime rates among juveniles have steadily declined since the mid 1990s,⁹⁵ though, in all likelihood, this cannot be attributed to strict transfer laws, since numerous studies have shown transfer actually increases recidivism, and no strong evidence exists to support the argument that strict transfer laws operate as a general deterrent.⁹⁶

89. DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 15 (Marilyn McShane & Frank P. Williams III, eds., 2001).

90. Helen M. Alvare, *Symposium on Youth and the Law: Foreword: A Common Theme*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 3 (2008).

91. Nancy E. Gist, *Foreword to JAMES AUSTIN ET AL., U.S. DEP’T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT* iii (2000).

92. NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 155 (2007), <http://www.ncjrs.gov/pdffiles1/226680.pdf> (discussing the special vulnerability of juveniles held in confinement with adults).

93. Helen M. Alvare, *Symposium on Youth and the Law: Foreword: A Common Theme*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 3 (2008).

94. *Id.* (highlighting the problems with the increase in juveniles serving time in adult prisons as a result of harsher transfer laws) (footnote omitted).

95. *Id.*

96. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* JUVENILE JUSTICE BULLETIN, Aug. 2008, at 2, available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

III. JUVENILES DESERVE DIFFERENT TREATMENT AND THEREFORE JUVENILE TRANSFER SHOULD BE LIMITED

A. *Juvenile Offenders are Less Culpable than Adult Offenders*

“Culpability” is used to describe a handful of overlapping concepts including responsibility, accountability, and blameworthiness.⁹⁷ The legal system has traditionally recognized that punishment for criminal acts should correspond not only to the harm caused by the crime, but also to the blameworthiness of the actor.⁹⁸ Blameworthiness, in turn, depends on the person committing the crime as well as the surrounding circumstances of the wrongful act.⁹⁹ Courts typically consider a variety of mitigating factors when determining the culpability of an offender, including the person’s character and any evidence of impaired decision making.¹⁰⁰ The idea that adolescents are more amenable to treatment and more capable of true rehabilitation is grounded in both common sense and in the history of the American legal system.¹⁰¹ As the previous section outlined, the history of the juvenile justice system in the United States was based on the idea that juveniles should be treated differently and that they can and should be rehabilitated instead of punished.¹⁰² As such, children were considered potentially less blameworthy.¹⁰³

The notion that the law recognizes the differences between adults and children can be best illustrated by considering the limitations and restrictions it places on minors for certain types of activities.¹⁰⁴ For example, parental consent is required by thirty-six states for youth under eighteen

97. Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 379, 393 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

98. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, *ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE* 1 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf.

99. *Id.*

100. *Id.*

101. See DAVID L. MYERS, *EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER* 12 (Marilyn McShane & Frank P. Williams III, eds., 2001).

102. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, *FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM* 5 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf>.

103. See MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, *ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE* 1–3 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf.

104. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, *FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM* 10–11 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf> (explaining the

years old to marry; minors cannot buy pornography in forty-eight states, either because the sale is absolutely prohibited, or parental consent must first be obtained; forty-two states limit the minor's ability to get a tattoo by either requiring parental consent or absolutely prohibiting the practice until the minor reaches eighteen; body piercing is limited by thirty-three states and minors in those states must either obtain parental permission or are prohibited altogether from getting a body piercing; and forty-two states and the District of Columbia do not allow youth under eighteen years old to obtain a driver's license completely free from legal restrictions.¹⁰⁵ These are just a handful of examples illustrating the law's differing treatment of children and adults, reflecting the belief that children and adults are fundamentally different.¹⁰⁶ The law's recognition that certain activities should be restricted for youth speaks to a young person's culpability for the wrongful conduct. After all, if the law reflects the belief that a minor is incapable of properly weighing the decision to get a tattoo, then when a minor makes an ill-considered choice to commit a robbery, the law must take into account the decision was comparatively less well-considered, recognizing the minor's diminished culpability in the act.

i. Scientific Data and the Diminished Culpability of Youth

Brain development research shows physiological differences account for many of the disparities between adult and adolescent thought processes. Decision-making capabilities of adolescents develop at varying rates.¹⁰⁷ While cognitive capacities for processing and reasoning are likely similar to those of adults by the middle of adolescence, the ability of teens to make "real-life decisions" is less developed.¹⁰⁸ Thus, although research shows intellectual abilities are fully developed by the time an

well established practice of state legislatures passing laws distinguishing between the rights of adults and juveniles).

105. *Id.* at 11 (listing a wide variety of areas in which the rights of juveniles are limited by state laws).

106. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 11 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf>.

107. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 811 (2003) (discussing the point at which adolescent cognitive development is comparable to adults).

108. *Id.* (explaining that physiological inequalities between adults and adolescents are not the cause of poor judgment by adolescents); MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 2 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf.

individual reaches about sixteen years of age,¹⁰⁹ the psycho-social development of an adolescent progresses less rapidly than cognitive ability,¹¹⁰ and continues to evolve well into early adulthood.¹¹¹ Consequently, the decisions made by teens are different than those made by adults due to teens' immature judgment.¹¹²

Adolescents are limited in their capacity to consider hypothetical situations, and this limitation may be responsible for teens' general lack of skills in properly accounting for the future.¹¹³ Youths also tend "to weigh more heavily short-term consequences of decisions—both risks and benefits—in making choices."¹¹⁴ For example, one study involved an exercise in which adolescents and adults were asked questions such as, "Would you rather have \$100 today or \$1,000 a year from now?"¹¹⁵ The results showed adolescents were willing to accept a lower amount of money in order to get paid immediately instead of waiting for a sum of money that was ten times as large.¹¹⁶

Teens also tend to focus on the rewards of an action, while generally overlooking the risks attached to it.¹¹⁷ It is not difficult to envision how impulsivity can create negative consequences for a juvenile in a high-risk

109. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 2 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf (explaining the results of a study conducted of roughly 1,000 people between ten and thirty years of age). The study sought to explain the differences in age groups in decision-making and the factors that are relevant to mitigation and that change over time, such as impulsivity, future consequences, and the ability to resist peer pressure. *Id.* The subjects of the study were chosen from five different regions in the country and were diverse both socioeconomically and ethnically. *Id.* The results of the study were in line with other recent findings from the neuroscience field. *Id.* at 3.

110. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 811–13 (2003) (describing adolescence as a period of identity formation).

111. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 2 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf.

112. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 813 (2003) ("While cognitive capacities shape the process of decision-making, immature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices.").

113. *Id.* at 814 (explaining that adolescents prefer to live in the present, rather than consider events that have yet to occur).

114. *Id.* (attributing poor judgment by adolescents to an inability to weigh the long-term consequences of their actions).

115. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 2 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf.

116. *Id.*

117. *Id.*

situation.¹¹⁸ Peer pressure is also a major factor in a minor's ability to make decisions. Recent neuroscientific research reveals "that the brain systems that govern the processing of emotional and social information are affected by the hormonal changes of puberty in ways that make people more sensitive to the reactions of those around them."¹¹⁹ Consequently, adolescents are more susceptible to peer pressure than adults.¹²⁰

Perhaps most significantly, brain research indicates the parts of the brain that relate to the highest-level functioning, like abstract reasoning, are the last to develop.¹²¹ This delay "affects judgment and decision making by impeding the ability to plan ahead and learn from past experience."¹²² Skills including regulating emotion, controlling impulses, evaluating risk, and future planning are all negatively impacted by the late development of the regions of the brain responsible for these abilities.¹²³ The frontal lobe of the brain, which is among the last parts of the brain to develop, is responsible for the most advanced functions.¹²⁴ In fact, recent neurological research shows the brain is not fully formed, or fully developed, until twenty-five years of age.¹²⁵

All of these findings inform the determination of a minor's culpability for an illegal act. The data show that, in critical ways, juvenile minds are less developed than adult minds and thus are generally less culpable for their criminal acts.¹²⁶ Obviously, the law does not need science to con-

118. *Id.*

119. *Id.*

120. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 3 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf.

121. Patricia Puritz & Katayoon Majd, *The American Bar Association's Youth at Risk Initiative: Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 474 (2007).

122. *Id.*

123. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003).

124. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 13-14 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf>.

125. *Id.* at 13.

126. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 1-3 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf (discussing adolescents' underdeveloped psychosocial capabilities, their characteristic short-sighted decision making, poor impulse control, and vulnerability to peer pressure). The report argues that developmental immaturity should be added to the traditional list of mitigating factors that courts consider when determining a particular defendant's culpability. *Id.* at 1. Explaining the traditional factors of mitigation, the report lists impaired decision making capacity, typically as a result of mental illness or disability; the specific circumstances of the criminal

firm this fact. As previously noted, the idea that children deserve different treatment than adults, and thus are potentially less blameworthy, formed the basis of the development of the juvenile justice system.¹²⁷ However, transfer laws throw out this common-sense notion, and therefore should be severely limited in their use. Although not addressing transfer laws per se, the U.S. Supreme Court engaged in thoughtful and lengthy consideration of the culpability of youth in the recent death penalty decision of *Roper v. Simmons*.¹²⁸

ii. *Roper v. Simmons* and the Death Penalty for Youth

The culpability of an individual under eighteen years of age was at issue in the U.S. Supreme Court decision of *Roper v. Simmons*.¹²⁹ In *Roper*, seventeen-year-old Simmons brutally murdered a woman by breaking into her home, tying her up, taking her to a state park, and throwing her into a river.¹³⁰ She drowned and her body was found a few days later.¹³¹ Simmons was tried and convicted as an adult, and a jury sentenced him to death.¹³² Simmons obtained new counsel and on appeal

act; and the personal character of the accused, which may give insight into the level of risk that person poses of continuing criminal behavior. *Id.*

127. *Id.* (outlining the arguments advanced by proponents of tougher juvenile laws, which hold that since youths are committing more serious offenses involving guns and drugs, adult punishment is necessary). The report points out that the entire premise of the juvenile system is dependent on the belief that adults and juveniles are not equally culpable for wrongful actions. *Id.*

128. See *Roper v. Simmons*, 543 U.S. 551, 551 (2005) (holding that the imposition of the death penalty on youth who were under eighteen years of age at the time they committed an offense constitutes a violation of the Eighth and Fourteenth Amendments).

129. *Id.* at 578. The American Bar Association (ABA) came out against capital punishment for youth who committed offenses while under the age of eighteen in 1983. Adam Caine Ortiz, *Juvenile Death Penalty: Is it "Cruel and Unusual" in Light of Contemporary Standards?*, 17 CRIM. JUST. 21, 21 (2003). The ABA resolution, drawing on "the lessons and history of the juvenile court system," which clarifies that juvenile offenders should not be treated in the same way as adults and not subject to the same sanctions as adult criminals, asserted "adolescents are most amenable to treatment and rehabilitation." *Id.* In illustrating this point, Ortiz discussed the cases of two seventeen year olds—Simmons from Missouri, and Beazley from Texas—who were both sentenced to die. *Id.* While in prison, both behaved like model prisoners, expressing "great remorse for their crimes." *Id.* Both young men cared for fellow inmates, participated in community service, and espoused firm religious beliefs: "Photogenic and articulate, they both attracted international attention." *Id.* In May of 2002, Simmons was granted a temporary stay of execution by the Missouri State Supreme Court to determine whether his sentence of execution was considered cruel and unusual. *Id.* Beazley, on the other hand, was executed in Texas. *Id.*

130. *Roper*, 543 U.S. at 556–57.

131. *Id.*

132. *Id.* at 557–58 (outlining the facts and procedural history of Simmons' case).

asserted that his previous counsel had been ineffective at trial.¹³³ Witnesses were called to lend support to this contention, including the clinical psychologists who had met with Simmons and conducted evaluations on him.¹³⁴ The testimony revealed “that Simmons was ‘very immature,’ ‘very impulsive,’ and ‘very susceptible to being manipulated or influenced.’”¹³⁵ The testimony included a description of Simmons’ home life as difficult and his behavior as having changed dramatically.¹³⁶ Before his crime, Simmons was away from home for extensive periods of time, using drugs and alcohol with others.¹³⁷ Simmons’ counsel argued all of the factors attested to by the expert witnesses should have been asserted during the sentencing proceeding and the assistance of Simmons’ counsel was ineffective for not having done so.¹³⁸ The trial court disagreed and denied Simmons’ motion for post conviction relief, finding no constitutional violation.¹³⁹ The ruling was affirmed by the Missouri Supreme Court in 1997.¹⁴⁰ Roper remained in prison until *Atkins v. Virginia* was decided, after which he renewed his appeal.¹⁴¹

In 2002, the U.S. Supreme Court decided *Atkins*, holding that executing mentally retarded individuals fails to uphold the two justifications for the death penalty—retribution and deterrence—and therefore it is cruel and unusual to impose the death penalty on mentally retarded criminals.¹⁴² In *Atkins*, the Court stated:

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often *act on impulse* rather than pursuant to a premeditated plan, and that in group settings they are followers rather than lead-

133. *Id.* at 558 (describing the justification behind Simmons’ act of securing new counsel).

134. *Id.* at 559.

135. *Roper*, 543 U.S. at 559 (describing Simmons’ attorney’s attempt to assert the relevance of Simmons mental and behavioral characteristics to the prior hearing).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Roper*, 543 U.S. at 559.

141. *Id.*

142. *Atkins v. Virginia* 536 U.S. 304, 321 (2002) (construing the Eighth Amendment in light of “evolving standards of decency”).

ers. Their deficiencies do not warrant an exemption from criminal sanctions, but they do *diminish their personal culpability*.¹⁴³

After *Atkins* was decided, Simmons attempted to gain state post-conviction relief.¹⁴⁴ Simmons argued before the Missouri Supreme Court that the Court's reasoning in *Atkins* applies to juveniles as well, and bars the execution of individuals who were under the age of eighteen when they committed the offense.¹⁴⁵ The Missouri Supreme Court agreed with Simmons and set aside his death sentence, instead sentencing him to life imprisonment.¹⁴⁶ The U.S. Supreme Court granted certiorari and Justice Kennedy authored the opinion of the Court.¹⁴⁷ After a thorough review of the Court's decisions relating to the death penalty,¹⁴⁸ Justice Kennedy turned to the question in *Roper*: "whether the death penalty is a disproportionate punishment for juveniles."¹⁴⁹ Justice Kennedy noted with approval¹⁵⁰ the language in *Atkins* that described the need to limit execution only to individuals who commit "a narrow category of the most serious crimes"¹⁵¹ and "whose extreme culpability makes them 'the most deserving of execution.'"¹⁵² The Court noted three differences between juveniles and adults: (1) the absence of maturity in youth and an underdeveloped understanding of the youth's own responsibility for his or her actions; (2) the special vulnerability, including the susceptibility of youth to negative influences, including peer pressure; and (3) the fact that the character of a minor is not as permanently formed as the character of an

143. *Id.* at 318 (emphasis added) (footnotes omitted).

144. *Roper*, 543 U.S. at 559.

145. *Id.*

146. *Id.* at 559–60 (noting that the Missouri Supreme Court sentenced Simmons to "life imprisonment without eligibility for probation, parole, or release except by act of the governor").

147. *Id.* at 551.

148. Prior to *Roper*, in 1988, the Supreme Court ruled in *Thompson v. Oklahoma* that imposing the death penalty on an individual who committed an offense when they were less than sixteen years of age was unconstitutional and violated the Eighth and Fourteenth Amendments. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (refraining from extending their ruling to include persons who committed offenses when they were over sixteen years of age but under eighteen years of age). The next year, however, in *Stanford v. Kentucky*, the Court ruled that executing individuals for crimes committed when they were between sixteen and eighteen years old did not violate the Eighth Amendment. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). *Stanford* held that there is "neither a historical nor modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age." *Id.*

149. *Roper*, 543 U.S. at 564.

150. *Id.* at 568.

151. *Atkins*, 536 U.S. at 319 (restricting the severity of punishment to reflect the offender's culpability).

152. *Roper*, 543 U.S. at 568 (quoting *Atkins v. Virginia* 536 U.S. 304, 319 (2002)).

adult.¹⁵³ Justice Kennedy expressly stated that due to these differences, juveniles cannot be considered among the worst offenders.¹⁵⁴

In elaborating on the first difference, the lack of maturity among youth, the Court noted juveniles frequently behave impetuously, and make ill-considered decisions.¹⁵⁵ In explaining the second difference, that minors are especially vulnerable to bad influences, the Court stated youths actually have less control over their environments than adults, and are less able to get themselves out of potentially harmful or "criminogenic" settings.¹⁵⁶ Finally, in describing the third difference, that of a less well-formed character, Justice Kennedy asserted, "The personality traits of juveniles are more transitory, less fixed."¹⁵⁷ The opinion concluded that due to these differences, the two justifications for the death penalty, retribution and deterrence, simply do not apply sufficiently to juveniles as they do to adults.¹⁵⁸ Thus, the Court determined imposing the death penalty on individuals who committed crimes before they were eighteen years old constitutes cruel and unusual punishment, and is a violation of the Eighth and Fourteenth Amendments.¹⁵⁹

iii. Applying the *Roper* Analysis to Juvenile Transfer

Although *Roper* did not address the question of juvenile transfer to adult court, the Court's reasoning speaks to the wisdom of certifying juveniles to stand trial as adults. The Supreme Court's justifications for its ruling, namely, the three differences between adults and juveniles, counsel against treating children and adults identically, as is the case when a minor is transferred to adult court. In *Roper*, the Court stated:

The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.¹⁶⁰

The *Roper* Court held the culpability or blameworthiness of juveniles is significantly diminished due to juveniles' youth and immaturity, thus, the

153. *Id.* at 569–70 (relying on a variety of scientific studies and amici in recognizing the three major differences between adults and juveniles).

154. *Id.* at 570.

155. *Id.* at 569.

156. *Id.*

157. *Roper*, 543 U.S. at 570.

158. *Id.* at 571–72.

159. *Id.* at 578.

160. *Id.* at 570.

law must account for the differences between youth and adults.¹⁶¹ Similarly, transfer of minors to the adult system should be used in only the most exceptional circumstances, and protections must be in place to ensure juveniles are not routinely routed out of the specialized juvenile system and into the less rehabilitative adult criminal justice system. As noted in *Roper*, scientific data support the contention that juveniles are less culpable than adults.¹⁶²

The *Roper* analysis, which relied heavily on scientific brain research,¹⁶³ counsels for a continuation of the use of separate systems for juvenile and adult offenders.¹⁶⁴ When a juvenile is certified to stand trial as an adult, the important distinctions between the culpability of adults and children are lost.¹⁶⁵ The wisdom of viewing and treating minors differently from adults is overshadowed by the punitive desire to make minors “pay” for their crimes. The problem with the view, “adult time for adult crime,” is that it simply does not work.¹⁶⁶ Juvenile transfer heightens the costs to society and ultimately society is less safe. Further evidence that transfer should be used sparingly is revealed in studies of juveniles in adult corrections facilities showing the detrimental effects of locking juveniles up with adult criminals.

161. *See id.* at 570–72.

162. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 3: LESS GUILTY BY REASON OF ADOLESCENCE 2 (2010), http://www.adjj.org/downloads/6093issue_brief_3.pdf; *see* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816–17 (2003).

163. *See generally Roper*, 543 U.S. at 551.

164. *See* Helen M. Alvare, *Symposium on Youth and the Law: Foreword: A Common Theme*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 4 (2008).

165. As Professor Alvare points out:

[O]ver the last decade, the weight of the research evidence has increased, not decreased, which indicates that adolescents are not the equal of adults in the areas of judgment, impulse control, risk assessment, and the ability to resist negative peer and community influences. That youths’ incomplete development mitigates their culpability was acknowledged as common sense by the U.S. Supreme Court’s *Thompson v. Oklahoma* and *Roper v. Simmons* opinions.

Helen M. Alvare, *Symposium on Youth and the Law: Foreword: A Common Theme*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 5 (2008) (footnotes omitted).

166. *See* MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 5: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT 3 (2010), http://www.adjj.org/downloads/3582issue_brief_5.pdf (explaining that although proponents of harsher policies for youth believe that making juveniles do “hard time” will serve as a deterrent, in reality, a large-scaled New York study showed the opposite, that recidivism rates increase when juveniles serve time in adult facilities).

B. *Locking up Juveniles with Adults Hurts Everyone*

i. Increased Victimization and Suicide Rates

Adult jails are unsafe places for children, and unsurprisingly, youth who are incarcerated with adults are at high risk of physical and sexual assault.¹⁶⁷ A 2007 report by the National Prison Rape Elimination Commission found juveniles incarcerated in adult jails and prisons are at a much higher risk for sexual abuse, noting that although youth made up less than 1% of those confined in adult jails in 2005, juveniles accounted for 21% of the victims of the substantiated inmate-perpetrated sexual violence that occurred that year.¹⁶⁸ Another study found juveniles held in adult prisons are five times more likely to be sexually victimized than those held in juvenile facilities.¹⁶⁹ Because prisoners are often reluctant to report sexual abuse, the actual instances of abuse are likely much higher than surveys reveal.¹⁷⁰ Criminologist Jeffrey Fagan notes, “[B]ecause they are physically diminutive, [juveniles] are subject to attack. . . . They will become somebody’s ‘girlfriend’ very, very fast.”¹⁷¹ A prison guard in one report stated there is almost zero chance for a young inmate to avoid being raped: “He’ll get raped within the first twenty-four hours to forty-eight hours. That’s almost standard.”¹⁷²

167. CAMPAIGN FOR YOUTH JUSTICE, *JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA* 4 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

168. NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 42 (2007), <http://www.ncjrs.gov/pdffiles1/226680.pdf> (comparing the rates of abuse among jails and residential correctional facilities). Other populations especially vulnerable to sexual abuse include individuals who are small in stature, female prisoners, survivors of past sexual abuse, individuals who are physically or developmentally disabled, gays, lesbians, bisexuals, transgender people, and immigration detainees. *Id.* at 70–73, 147, 175.

169. RANDALL G. SHELDEN, *DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY* 344 (2006) (describing the results of a study comparing young people in juvenile training schools with youth in adult prisons). The study found that roughly 10% of youths in adult prisons disclosed they had been sexually assaulted, while only about 1% of young people in juvenile training schools reported being sexually assaulted. *Id.* Studies in other countries reveal similar results. *Id.* A study in Australia of youth in one prison found that 25% of the young people reported they had been victims of sexual assault. *Id.* Additionally, a Canadian survey of a federal prison revealed that twenty-year old prisoners were eight times more likely to have been sexually assaulted than older inmates. *Id.*

170. NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 101 (2007), <http://www.ncjrs.gov/pdffiles1/226680.pdf> (discussing the reasons why incarcerated individuals do not report instances of sexual abuse and the need for improvements in order to promote reporting in correctional facilities).

171. RANDALL G. SHELDEN, *DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY* 344 (2006) (explaining that within male prisons, the typical victim is the youngest prisoner).

172. *Id.*

The devastating and lifelong effects of sexual abuse cannot be overstated. Juveniles sexually abused while in confinement are likely to be plagued by lasting emotional and psychological consequences.¹⁷³ These damaging effects can heighten the risk of drug abuse and recidivism.¹⁷⁴ Depression, post-traumatic stress disorder, anger, hopelessness, difficulty with impulse control, dissociative episodes, a poor sense of self, deep feelings of shame, and flashbacks are all strongly correlated with sexual abuse.¹⁷⁵ Similarly, “[a] history of childhood sexual abuse is strongly correlated with higher rates of attempted suicide, alcohol dependence, nicotine dependence, social anxiety, and divorce.”¹⁷⁶

Yet another cost of incarcerating youth is their increased risk of suicide.¹⁷⁷ Suicide ranks as the third most common cause of death among fifteen to twenty-four year olds in the general population.¹⁷⁸ When youth are incarcerated, they “are 19 times more likely to commit suicide in jail than youth in the general population and 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility.”¹⁷⁹ Moreover, for every completed suicide among individuals between ages fifteen to twenty-four, several hundred attempts are made.¹⁸⁰

The data convincingly outlines the high probability that a young person in an adult facility will become the target of physical and sexual violence and be at higher risk for suicide.¹⁸¹ Children deserve protection while

173. NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 153 (2007), <http://www.ncjrs.gov/pdffiles1/226680.pdf> (outlining the many difficulties that youth who experience sexual abuse in detention facilities must contend with throughout the remainder of their lives).

174. *Id.*

175. *Id.*

176. *Id.*

177. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 10 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

178. *Id.* (noting that juveniles are already at heightened risk of suicide by virtue of their ages and incarceration only intensifies and increases the risk).

179. *Id.* at 4 (footnote omitted) (discussing the impact of time at an adult jail on the juvenile psyche). The “best estimates” regarding suicide rates among incarcerated youth mentioned above were reported by the Centers for Disease Control in a 1978 study. *Id.* at 10. Some jail personnel attempt to remove youth from adult inmates in order to protect them, only to place the juveniles in near total isolation. *Id.* at 4. A juvenile in isolation is often “locked down 23 hours a day in small cells with no natural light.” *Id.* These conditions lead to anxiety and paranoia, intensify existing mental disorders, and lead to a greater risk of suicide. *Id.*

180. *Id.* at 10 (stating that non-lethal suicide attempts can severely affect a young person’s general health and state of being).

181. JAMES AUSTIN ET AL., U.S. DEP’T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 9 (2000) (noting that due to the increased risks

they grow and mature, and adult jails and prisons are entirely inappropriate environments for youth, even those youth who have committed heinous acts. In fact, the youth who have engaged in the most serious criminal acts are the ones most in need of intervention, rehabilitation, therapy, and treatment. While the juvenile justice system is by no means perfect, only the juvenile justice system is equipped to provide the necessary treatment for the “worst” of the nation’s young offenders. Youth must be held accountable for their actions. But punishing them in the adult system does not accomplish any meaningful or positive outcome for the individual youth, or for society as a whole. Additionally, when young offenders are victimized, they are more likely to become aggressive with women and children in the future.¹⁸² Keeping juvenile offenders out of the adult system not only helps the individual, but also benefits society by reducing the harmful effects following the aftermath of violence perpetrated against a young offender.

ii. Increased Recidivism Rates and Stigma: What Happens Once Juveniles are Released

Juveniles who are prosecuted as adults are more likely to re-offend than youth who remain in the juvenile system.¹⁸³ The Centers for Diseases Control and Prevention found youth who are certified as adults are roughly “34% more likely than youth retained in the juvenile court system to be re-arrested for violent or other crime.”¹⁸⁴ A number of other studies have concluded minors convicted in adult criminal court have higher recidivism rates than similar offenders who remain in the juvenile system and are adjudicated in juvenile courts.¹⁸⁵ A MacArthur Foundation study of over 2,000 young offenders who committed either burglary, aggravated assault, or armed robbery found the offenders who were prosecuted in the adult system were 85% more likely to be re-arrested for violent crimes than those kept in the juvenile system; they were also 44% more likely than youth remaining in the juvenile courts to be re-arrested

experienced by transferred youth, adult correctional systems are faced with new problems). The studies that provide hard facts on the numbers of abused young people in adult prisons are not surprising; these revelations are rooted in common sense.

182. RANDALL G. SHILDEN, *DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY* 344 (2006).

183. *National Statistics*, CAMPAIGN FOR YOUTH JUST., <http://www.campaign4youthjustice.org/national-statistics.html> (last visited Dec. 23, 2010).

184. *Id.*

185. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* JUVENILE JUSTICE BULLETIN, Aug. 2008, at 2, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

for felony property offenses.¹⁸⁶ Yet another report on juveniles in adult courts found children processed through the adult system stand a greater chance of being re-arrested more frequently and more quickly for committing serious crimes.¹⁸⁷

Recidivism and deterrence are intimately related. In line with the findings on recidivism, “[s]tudies show that transfer [laws] fail[] to deter violent juvenile offenders.”¹⁸⁸ Various studies on transfer depict an increase in recidivism rates among these offenders.¹⁸⁹ More broadly, transfer, in terms of both specific and general deterrence, is not as effective as initially anticipated.¹⁹⁰ Six large-scale studies have examined whether transfer results in specific deterrence and have found recidivism rates for youth convicted in adult court were higher than similar juvenile offenders who were tried in juvenile court.¹⁹¹ The studies that have looked at the general deterrent effects of transfer laws, although inconsistent, seem to suggest these laws probably “have little or no general deterrent effect in preventing serious juvenile crime.”¹⁹²

186. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 5: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT 1 (2010), http://www.adjj.org/downloads/3582issue_brief_5.pdf (describing the study conducted from 1992–1999 in the New York and New Jersey area). Two groups of juveniles were tracked: those transferred to the adult system and those who remained in the juvenile system. *Id.* The individuals were chosen from the same urban area, had similar economic opportunities, similar access to weapons, and similar exposure to gang influences and drug use. *Id.* The re-arrest rates were determined only after researchers controlled for time juveniles spent on the street. *Id.* The methods of the study were aimed at eliminating factors that would influence re-arrest rates so that any differences in those rates could be attributed to the different justice systems that youths experienced. *Id.*

187. CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4–5 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf (noting agreement among physicians and criminologists that minors prosecuted in the adult system are at greater risk for re-arrest than minors that remain in the juvenile courts).

188. Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 183 (2007).

189. *Id.* (“This increased recidivism manifests a failure to deter, a failure to rehabilitate, and most significantly, a failure to protect society.”).

190. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* JUVENILE JUSTICE BULLETIN, Aug. 2008, at 2, available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

191. *Id.* at 4.

192. *Id.* at 3 (explaining that the limited research available on the effect of juvenile transfer laws as they relate to general deterrence is inconsistent and “does not permit strong conclusions”). Noting the need for more research on whether transfer laws could be implemented in such a way as to ensure a general deterrent effect, Redding outlines three

Criminologist Jeffrey Fagan's research on juveniles reveals that although transferring young people to adult court may lower community risk by subjecting violent young offenders to lengthy incapacitation, "the social costs of imprisoning young offenders in adult facilities may be paid in later crime and violence upon their release."¹⁹³ Correspondingly, the Centers for Disease Control and Prevention Task Force on Community Preventative Services found the practice of processing juveniles in the adult criminal justice system amplifies violence, and policies that do so are "counterproductive" to the goals of decreasing violence and strengthening public safety.¹⁹⁴

When juveniles are released from prison, their feelings of self-worth and their ability to move forward in life are affected by the stigma of criminal convictions. These factors are difficult to quantify, but they are no less real. The stigma of a felony conviction can impair a young person's ability to pursue employment and educational opportunities, as well as other positive adult roles.¹⁹⁵ Possibilities that might otherwise lead a young person away from criminal activity may be made more difficult or foreclosed altogether due to a felony conviction.¹⁹⁶ Moreover, the messages juveniles receive from the legal system will likely affect their self-perception. Trying a juvenile as an adult may convey an impression of hopelessness, leading "repeat offenses [to] become a self-fulfilling prophecy."¹⁹⁷ Significantly, adult facilities offer fewer and weaker ser-

main questions that must be explored: (1) Whether youth are aware of transfer laws; (2) Whether youth believe the laws will be used against them; and (3) Does awareness of the transfer laws and the fact that they could be used against youths deter criminal behavior. *Id.*

193. RANDALL G. SHELDEN, *DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY* 344 (2006).

194. CAMPAIGN FOR YOUTH JUSTICE, *JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA* 5 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

195. MACARTHUR FOUNDATION, *RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 5: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT* 4 (2010), http://www.adjj.org/downloads/3582issue_brief_5.pdf; Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 184 (2007) (explaining why transfer to adult court increases juvenile recidivism rates).

196. MACARTHUR FOUNDATION, *RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 5: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT* 4 (2010), http://www.adjj.org/downloads/3582issue_brief_5.pdf.

197. *Id.* Young people who have been tried as adults frequently feel that they were unjustly treated, creating a negative perception of the justice system that leads them "to adopt a 'delinquent self-concept' which also causes them to re-offend." Enrico Pagnanelli,

vices, and often educational and vocational services are lacking.¹⁹⁸ Youth in juvenile facilities will have more opportunities for education and rehabilitative intervention than those incarcerated with adults.¹⁹⁹ Perhaps most importantly, juveniles held with adults during the critical developmental stage of adolescence will be limited in their exposure to social norms, and limited in their ability to develop a “diverse behavioral toolkit from the wider social networks of family, school or work, and community.”²⁰⁰ Instead, juveniles incarcerated with adults may learn social behavior that legitimizes “domination, exploitation, and retaliation.”²⁰¹

Young people who commit crimes must be held accountable, but they must not be disproportionately punished by being incarcerated with adult convicts. Young offenders deserve the educational, rehabilitative, and therapeutic services the juvenile justice system offers. They deserve to be safe and secure in their person,²⁰² and a chance to learn a way of life that does not involve crime. Waiving jurisdiction over a juvenile, and certify-

Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 184 (2007) (exploring the statements made by youth who have been in the adult criminal justice system and who describe the system as “duplicious and manipulative, malevolent in intent, and indifferent to their needs”).

198. MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 5: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT 4 (2010), http://www.adjj.org/downloads/3582issue_brief_5.pdf; CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 4 (2007), http://www.campaign4youthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf (“A [Bureau of Justice Statistics] survey found that 40% of jails provided no educational services at all, only 11% of jails provided special education services, and only 7% provided vocational training.”).

199. See MACARTHUR FOUNDATION, RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, ISSUE BRIEF 5: THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT 4 (2010), http://www.adjj.org/downloads/3582issue_brief_5.pdf.

200. *Id.*

201. Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 184 (2007).

202. JAMES AUSTIN ET AL., U.S. DEP’T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 11 (2000) (asserting that a youth in detention has a right to humane treatment, as well as education, mental health care, due process protection, medical care, and access to the youth’s family and the courts). These rights exist whether a child is in a training school, a juvenile detention center, or an adult jail or prison, as the “rights emanate from the U.S. Constitution and federal laws, including the Juvenile Justice and Delinquency Prevention Act; from state constitutions and laws; and from court interpretations of these laws.” *Id.* Additionally, many states have laws that give minors a right to receive treatment and rehabilitation. *Id.*

ing the juvenile to stand trial as an adult should occur only in rare circumstances, and Texas must make statutory changes to reflect this goal.

IV. SPECIFIC STATUTORY REFORMS

A. *Waiver, Certification, and Transfer in Texas*

In Texas, discretionary transfer of minors from juvenile to adult criminal court is governed by § 54.02 of the Texas Juvenile Justice Code, “Waiver of Jurisdiction and Discretionary Transfer to Criminal Court.”²⁰³ Children who are fourteen years old or older can be transferred to adult court if they commit a capital felony, an aggravated controlled substance felony, or a felony of the first degree.²⁰⁴ A child who is fifteen years or older can be transferred for all of the above-listed felonies as well as for a second or third degree felony, or a state jail felony.²⁰⁵

If a prosecutor seeks transfer, a mandatory hearing will be held, with a judge but without a jury, during which the prosecutor seeking transfer must show there is probable cause to believe the child committed the alleged offense.²⁰⁶ Prior to the mandatory hearing, the court must order and receive a complete diagnostic study, as well as a social evaluation, a complete investigation of the juvenile, and the circumstances and details surrounding the alleged offense.²⁰⁷ During the hearing, the court may, but is not required to, consider reports written by probation officers, professional consultants, or professional court employees, in addition to witness testimony.²⁰⁸ In determining the appropriateness of transfer, the judge is required to consider, “among other matters,” the following four factors:

- (1) whether the alleged offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
- (2) the sophistication and maturity of the child;
- (3) the record and previous history of the child; and
- (4) the prospects of adequate protection of the public and the likelihood of the rehabilitation of the child by use of procedures, services, and facilities currently available to the juvenile court.²⁰⁹

203. TEX. FAM. CODE ANN. § 54.02 (West Supp. 2010) (specifying the procedures that must be followed by a juvenile court in a transfer hearing).

204. *Id.* § 54.02(a)(1)(A).

205. *Id.* § 54.02(a)(1)(B).

206. *Id.* §§ 54.02(a)(3), (c).

207. *Id.* § 54.02(d).

208. TEX. FAM. CODE ANN. § 54.02(e) (West Supp. 2010).

209. *Id.* § 54.02(f) (listing the factors that a judge is required to consider during a transfer hearing).

If the judge decides in favor of transfer, § 54.02(h) states the court “shall state specifically in the order its reasons for waiver and certify its action, including the written order and findings of the court.”²¹⁰ After the hearing, if a juvenile is transferred to adult court, he or she is not allowed to file a direct appeal of the decision and must wait until convicted in criminal adult court before appealing the transfer decision.²¹¹

B. The Need for Written, Individualized Findings by Judges in Transfer Hearings

The statutory language of § 54.02(h), outlined above, must be amended to require judges to write out all of the court’s findings that counsel in favor of transfer. At a minimum, the court must be required to write out its findings on each of the four specified factors it is required to consider by § 54.02(f).²¹²

While § 54.02(h) commands the court to state specifically the reasons for waiver,²¹³ in practice judges are not required to do much more than rubber-stamp the order for waiver.²¹⁴ Attorneys who practice juvenile law recognize transfer hearings often do not live up to the ideals set out in the Juvenile Justice Code.²¹⁵ Ellen Marrus, Director of Clinical Programs for the University of Houston Law Center,²¹⁶ asserts, “What judges tend to do is rubber-stamp . . . rather than consider all of the information and the individualized nature of the child’s case, which is what the juvenile court is supposed to do.”²¹⁷ Similarly, Dena Fisher, a former

210. *Id.* § 54.02(h).

211. CODE CRIM. PROC. ANN. art. 44.47(b) (West 2006) (allowing an appeal of a certification order from a juvenile court “only in conjunction with an appeal of a conviction”).

212. *See* TEX. FAM. CODE ANN. §§ 54.02(f), (h) (West Supp. 2010) (listing the four factors that a judge is required to consider when determining whether a child should be transferred to adult court).

213. *Id.* § 54.02(h).

214. Chris Vogel, *For Their Own Good*, HOUSTON PRESS, May 28, 2009, available at 2009 WLNR 10693190 (discussing the use by juvenile courts of generic forms in waiver hearings).

215. *Id.* (relaying comments from several practicing attorneys who have expressed reservations about the transfer process).

216. Ellen Marrus, UNIVERSITY OF HOUSTON LAW CENTER FACULTY, <http://www.law.uh.edu/Faculty/main.asp?PID=23> (last visited Dec. 23, 2010) (providing information on the faculty position of Professor Marrus and her professional accomplishments and publications). Professor Marrus focuses on children’s rights and clinical education and has worked at the University of Houston Law Center since 1995. *Id.*

217. Chris Vogel, *For Their Own Good*, HOUSTON PRESS, May 28, 2009, available at 2009 WLNR 10693190 (highlighting the negative ways that certification hearings are viewed in Texas by defense attorneys and other legal professionals). Vivian King, a criminal defense attorney, says the waiver process is “a joke. The judges don’t listen to the facts and they just certify the kids. There’s no meaningful consideration of the evidence, the

Harris County prosecutor,²¹⁸ says the thought of transfer hearings makes her “squirm,” further stating:

“I think that certification is a very big decision made with usually only one side of the story, the officer’s testimony,” . . . “And it’s supposed to be based on the best interest of society and whether the kid can be rehabilitated. It is usually a very quick decision on a very important matter.”²¹⁹

Attorney Jack Carnegie of Houston supports the use of individualized findings by judges that state the reasons why a juvenile is being certified for adult court.²²⁰ According to Carnegie, “The form orders make the same findings in every case, . . . and that results in these cases turning solely on the severity of the crime, and there’s a real question about whether those other factors that the Legislature says the court is supposed to consider are being properly considered.”²²¹ One of the most worrisome examples of unfair practices in transfer hearings comes from attorney Christene Wood, who represented a juvenile in a transfer hearing where the judge “was surfing the Internet and never made eye contact with the boy. . . . He covered his mouth and laughed during my closing argument. It was the most shocking and appalling proceeding I’ve ever seen as a lawyer in my career.”²²²

These are just a handful of examples and are not necessarily representative of the entire State of Texas. But clearly there is a need for a more rigorous statutory requirement for judges to actually engage in a meaningful analysis of the factors listed in the Texas Juvenile Justice Code.²²³ By allowing judges to simply sign off on a pre-printed form, current Texas law permits judges to fail to demonstrate they have sufficiently weighed the necessary factors and considered the seriousness of the transfer deci-

age; I didn’t see any of that.” *Id.* Not every Texas county takes certification hearings so lightly, according to Sean McAlister, who used to work as a Harris County juvenile prosecutor. *Id.* McAlister says that Fort Bend County has a much more formal certification process. Harris County, he says, has characteristically “read between the lines” and dismissed many formalities. *Id.*

218. *Attorney Profile*, THE LAW OFFICE OF DENA FISHER, <http://www.dfisherlawoffice.com/1883225.html> (last visited Dec. 23, 2010) (describing the background and professional legal services of Dena Fisher, who engages in criminal and juvenile defense work).

219. Chris Vogel, *For Their Own Good*, HOUSTON PRESS, May 28, 2009, available at 2009 WLNR 10693190.

220. *Id.*

221. *Id.*

222. *Id.* (explaining Wood’s experience with a young man she represented in Harris County). The juvenile was certified by the judge and sent to the Harris County jail while awaiting trial on charges of murder. *Id.*

223. TEX. FAM. CODE ANN. § 54.02(f) (West Supp. 2010) (listing four specific factors that the court must consider in certification hearings).

sion.²²⁴ For a young person, the repercussions of transfer to the adult system are far-reaching and severe. Judges must be required to record in writing all of their findings as to why, specifically, waiver of exclusive original jurisdiction is appropriate for each child. This will ensure judges will pay close attention during the hearing, and spend enough time considering the matter that recording a written description of the weighing process comes easily. The reality that transfer hearings are conducted in such a way that “rubber-stamping” is standard, even in a single court, is unacceptable and unjust. Accordingly, I propose the following change in the Juvenile Justice Code, § 54.02(h):

If the juvenile court waives jurisdiction, it shall state specifically in the order its reasons for waiver by providing a written description of the individualized findings of the court as they relate to each of the four factors enumerated in subsection (f) of this section. This written order must be authored by the judge and the judge may not use any preprinted form provided by either the court or the attorneys in the case.

By specifically requiring judges to write their reasons for waiver of exclusive jurisdiction, the judges presiding over the transfer hearings will be compelled to give special attention to the waiver process, and give suffi-

224. An example of a transfer order can be found on the Juvenile Law Section of the State Bar of Texas website. *Transfer Order Form*, STATE BAR OF TEXAS (2010), <http://www.juvenilelaw.org/Forms/Certification/04TransferOrder.pdf>. The form contains blanks for names and dates, as well as a list of the four statutory factors to be considered by the judge during the transfer hearing. *Id.* The form contains no spaces for meaningful comments by a judge. In the place of individualized findings, conclusory statements appear:

10. The Court considered the sophistication and maturity of the child and finds that Respondent is sophisticated and mature under the Code.

11. The Court considered the record and previous history of the child and the prospects of adequate protection of the public and the likelihood of rehabilitation of the child by use of procedures, services and facilities currently available to the juvenile court and the Court finds that the procedures, services, and facilities currently available to the juvenile court will not likely rehabilitate Respondent.

12. A full investigation and hearing of the child, his circumstances and the circumstances of the offenses was conducted by this Court and the Court finds that there is probable cause to believe that the child committed the offenses as alleged.

13. The Court has considered the seriousness of the offenses and the background of the child and finds that because of the seriousness of the offenses, the welfare of the community requires that criminal proceedings proceed in criminal court concerning the aforementioned felony offenses and all criminal conduct occurring in said criminal episodes.

Id.

cient consideration to whether the specific child before the judge is an appropriate candidate for transfer to adult court.²²⁵

This reform is consistent with the Texas Legislature's intent in amending § 54.02(e) during the 2009 legislative session.²²⁶ Senate Bill 518, introduced by Senator Jerry Harris, requires defense attorneys and prosecutors be given access to the juvenile's file, including written reports to be considered by the judge during the hearing, at least five days prior to the certification hearing.²²⁷ The Senate Committee's Bill Analysis contains Senator Harris' statement of intent, which asserts the bill is intended to help make the process of certification "as fair as possible."²²⁸ The House Research Organization (HRO) bill analysis of Senate Bill 518 expanded on the intent of the bill, stating the bill is intended to help decrease the number of juveniles "who are certified for trial as adults, diverting them to juvenile facilities where they can receive rehabilitative treatment, encounter less abuse, and become less likely to re-offend."²²⁹

Customarily, the HRO bill analyses contain both supporting and opposing arguments for each piece of legislation; notably, the HRO bill analysis of Senate Bill 518 reflects that the bill had no opponents.²³⁰ In fact, the bill passed unanimously in both houses.²³¹ The passage of this bill indicates the Texas Legislature, in its most recent act to amend the Juvenile Justice Code, supports limiting the number of minors who are transferred to adult court.²³² My proposal to amend § 54.02(h) to require

225. If the severity of the offense was the only factor the Texas Legislature wanted a judge to consider, the other factors would not appear in the Code. Instead of one determining issue, the legislature has laid out four factors and has also allowed for "other matters" to be considered by the judge during the hearing.

226. Senate Comm. on Jurisprudence, Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009) (outlining the rationale behind the proposed bill). The analysis acknowledges that subsequent to the decrease in the age limit for persons incarcerated in the Texas Youth Commission (TYC) from twenty-one years old to nineteen years old, prosecutors may pursue a greater number of adult certifications for juveniles. *Id.* The bill sought to ensure that the certification hearing was fair. *Id.*

227. *Id.*

228. *Id.*

229. House Research Organization, Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009) (providing the background for the bill as well as supporting arguments).

230. *Id.*

231. H.J. of Tex., 81st Leg., R.S. 4095-96 (2009) (recording the passage of S.B. 518 in the Texas House on May 20, 2009). The bill provides access to written documents concerning the possible transfer of a juvenile to criminal court to the juvenile's attorney and the prosecuting attorney at least five days before the discretionary transfer hearing. *Id.* at 4095. The bill passed with 140 Yeas, zero Nays and one member present, but not voting. *Id.* The House sponsor of the bill was Rep. Jerry Madden. *Id.*; S.J. of Tex., 81st Leg., R.S. 844 (2009) (reflecting that S.B. 518 passed the Texas Senate unanimously on April 2, 2009). Texas Senator Chris Harris authored and sponsored the bill. *Id.*

232. House Research Organization, Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009)

written, individualized findings is a natural and necessary step to further this goal.

Furthermore, the reasons listed in the HRO analysis reflect that the Legislature understands *why* transfer hurts juveniles, and society at large.²³³ The HRO bill analysis claims juveniles in adult jails or prisons are “36 times more likely to commit suicide,” face increased risk of assault—including sexual assault—and a shocking 21% of inmate-on-inmate violent sexual attacks in 2005 were committed against juveniles.²³⁴ Moreover, the analysis points out that juveniles in the adult system are at a higher risk for reoffending than those kept in the juvenile justice system and tend to engage in more serious and violent offenses.²³⁵ Additionally, the analysis links the benefits to the individual juvenile to the state at large, explaining, “Texas would save money by preventing future incarceration of these vulnerable youth.”²³⁶

Finally, the HRO analysis notes that over 40% of misdemeanor offenders who were sentenced to serve time in the Texas Youth Commission detention facilities had mental health needs.²³⁷ Likewise, over 40% of felony and misdemeanor offenders were in need of substance abuse treatment.²³⁸ The analysis concludes by acknowledging, “The services and counseling these adolescents need desperately is either lacking or inadequate in adult detention centers.”²³⁹

The legislative history of Senate Bill 518 clearly demonstrates the legislature recognizes the need to limit juvenile transfer. My proposal to require judges to write individual findings during transfer hearings is in line with this important goal because it will enhance the fairness of the certification process. Fewer juveniles will be transferred if judges are compelled to do more than simply rubber-stamp the transfer order, and juveniles will have greater chances of receiving the treatment and rehabilitation they need. Texas and its taxpayers will spend less money on future incarceration, and the citizens of Texas will benefit from improved public safety as a result of decreased recidivism among youth.

233. *Id.*

234. *Id.* In 2005, juveniles “comprised only one percent of the inmate population” while falling victim to over one fifth of inmates imposed sexual violence. *Id.*

235. *Id.*

236. *Id.*

237. House Research Organization, Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009).

238. *Id.* The need for treatment instead of punishment is perhaps most obvious in juveniles who exhibit problems with drugs and alcohol.

239. *Id.*

C. *The Need for an Immediate Right to Appeal a Transfer Hearing*

The need for individualized, written findings during the certification hearing is highlighted by the fact that Texas does not allow a juvenile to file an interlocutory appeal after an unfavorable transfer hearing.²⁴⁰ No appeal can be filed until after the conclusion of the criminal trial, meaning the juvenile will be transferred to adult jail to await a criminal trial.²⁴¹

Texas has not always prohibited immediate appeals of certification hearings.²⁴² But in an effort to “get tough” on juvenile crime, in 1995 the 74th Texas Legislature amended § 56.01, “Right to Appeal,” by removing the ability of a youth to immediately appeal a certification order.²⁴³ The legislative history of the acts of the 74th Legislature reveals the intent of the change that disallowed immediate appeal was to crack down on juvenile crime.²⁴⁴ By contrast, the most recent act of the Texas Legislature reveals the recognition among legislators that it is in the State’s best interest to decrease the number of juveniles transferred to adult court.²⁴⁵ Accordingly, I propose that an interlocutory appeal of a transfer hearing be allowed by the Juvenile Justice Code, so a juvenile is not required to wait until conviction in criminal court to appeal an objectionable transfer decision. This can be accomplished by amending § 56.01, “Right to Appeal,” to include appeals of § 54.02 certification hearings.²⁴⁶

Returning to the statutory language in place prior to the 1995 changes will make juvenile justice in Texas more fair and even-handed. Allowing immediate appellate review will result in an overall increase in the effectiveness of the justice system by serving as an important check on prose-

240. CODE CRIM. PROC. ANN. art. 44.47(b) (West 2006) (outlining that an appeal from a transfer hearing is only allowed in combination with the juvenile’s appeal of a conviction in criminal court).

241. *Id.*; 29 Thomas S. Morgan & Harold C. Gaither, Jr., *Texas Practice: Juvenile Law and Practice* § 23:3 (3d ed. 2008) (noting that appeals in juvenile court are pursued as they would be in civil cases, with the one exception of appeals for certification orders). An appeal of an order from juvenile court that waives jurisdiction is not allowable in the Texas civil system, and therefore must be combined with a criminal conviction appeal from an order in adult court. 29 Thomas S. Morgan & Harold C. Gaither, Jr., *Texas Practice: Juvenile Law and Practice* § 23:3 (3d ed. 2008); Chris Vogel, *For Their Own Good*, HOUSTON PRESS, May 28, 2009, available at 2009 WLNR 10693190.

242. See Act approved May 31, 1995, 74th Leg., R.S., ch. 262, 1995 Tex. Gen. Laws (current version at TEX. FAM. CODE § 51.01) (West 2008); TEX. FAM. CODE ANN. § 56.01 (West Supp. 2010); TEX. CODE CRIM. PROC. ANN. art. 44.47 (West 2006).

243. TEX. FAM. CODE ANN. § 54.02 (West Supp. 2010); Act approved May 31, 1995, 74th Leg., R.S., ch. 262, 1995 Tex. Gen. Laws.

244. House Research Organization, Bill Analysis, Tex. H.B. 327, 74th Leg., R.S. (1995) (describing the bill as an attempt to “address the surge in juvenile crime, ensure meaningful consequences for juvenile offenders and help protect public safety”).

245. House Research Organization, Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009).

246. TEX. FAM. CODE ANN. §§ 54.02, 56.01 (West Supp. 2010).

cutors and judges who improperly view transfers merely as routine formalities.²⁴⁷ Transfer from juvenile court to adult court should only occur in the most exceptional situations. The availability of an immediate appeal of transfer decisions, combined with the requirement of individualized findings for transfer hearings, will help reach the goal of limiting juvenile transfer in Texas.

D. *The Texas Youth Commission's Authority Must Extend to Youths up to Age Twenty-one*

Finally, Texas must reverse the age limitation imposed by Senate Bill 103, passed in response to the 2007 sex abuse scandal at the TYC.²⁴⁸ The transfer rate in Texas has risen by 22% since 2007, as prosecutors seek transfer in more cases.²⁴⁹ Raising the age limit back to its previous level of twenty-one years will decrease transfer rates.

Part of the rationale for lowering the age limit for TYC inmates was to reduce the numbers of youth being committed to the TYC.²⁵⁰ While this was a logical reaction to the problems the TYC had in 2007, the increased transfer rates have harmed young offenders in Texas. Under the careful watch of the Texas Legislature, the TYC has made significant changes in its operations, and the agency continues to institute positive reforms.²⁵¹

247. Chris Vogel, *For Their Own Good*, HOUSTON PRESS, May 28, 2009, available at 2009 WLNR 10693190 (relating the experiences of a variety of attorneys who are uncomfortable with the rubber-stamping that occurs in some certification hearings).

248. Tex. S.B. 103, 80th Leg., R.S. (2007) (encompassing a large number of reforms for the Texas Youth Commission, including a requirement that the age limit for youths held at the TYC be lowered from twenty-one years of age to nineteen); TEX. HUM. RES. CODE ANN. § 61.084(e) (West Supp. 2010).

249. Lisa Sandberg, *More Juvenile Offenders Landing in Actual Prison*, SAN ANTONIO EXPRESS-NEWS, Feb. 23, 2009, at 13A, available at 2009 WLNR 3502417 (noting that transfer rates in Texas have risen due to the lowered age limit of youths who can be committed to TYC, according to juvenile justice advocates). Advocates assert that young offenders are more amenable to rehabilitation and the harsher adult setting of adult prisons does not meet their needs. *Id.* Bexar County juvenile prosecutor Jill Mata expressed that when prosecutors don't believe they have sufficient time to work with a youth, they have no alternative, and therefore they seek certification and transfer the youth. *Id.*

250. House Comm. on Corrections, Bill Analysis, Tex. S.B. 103, 80th Leg., R.S. (2007) (outlining the changes to the Human Resources Code that require the TYC to discharge persons on their nineteenth birthday, rather than on their twenty-first birthday).

251. JAY KIMBROUGH, TEX. YOUTH COMM'N, REPORT FROM THE CONSERVATOR 5 (2007), http://www.tyc.state.tx.us/about/Conservator_Report.pdf (explaining some of the immediate steps taken after Governor Perry's March 2, 2007 executive order directing a full investigation into the sexual abuse scandal at the TYC); Alex Branch, *Audit Cites Texas Youth Commission Improvements*, FORT WORTH STAR-TELEGRAM, May 6, 2009, at B2, available at 2009 WLNR 8554749 (noting that while the TYC still faces many problems, the agency has improved in many areas, including the manner in which mistreatment allegations are handled).

Besides lowering the numbers of youth committed to TYC, the lowered age limit was intended to allow the TYC to “focus on its core mission of rehabilitating youths,” separating them from the “older offenders who are really adults.”²⁵² The latter concern was addressed at the time in Senate Bill 103, prohibiting placement of children younger than fifteen in a dormitory housing youths aged seventeen or older,²⁵³ which the TYC has implemented.²⁵⁴ This is an example of the measures that can be taken to ensure that older youth are not in a position to victimize younger children and thus serves to demonstrate that older youth can be safely housed with younger offenders. Accordingly, maintaining the age limitation at age nineteen instead of twenty-one is not necessary to ensure the protection of younger offenders at the TYC because internal procedures could successfully achieve this goal. Furthermore, the TYC has implemented a policy prohibiting the placement of sexual offenders with non-sexual offenders.²⁵⁵ Notably, the sex scandal that prompted the 2007 statutory changes involved adult employees at the TYC.²⁵⁶ Any worry about protecting younger inmates from older inmates appears to have been a secondary concern compared with the primary goal of reducing the numbers of inmates at overtaxed TYC facilities.²⁵⁷

252. House Research Organization, Bill Analysis, Tex. S.B. 103, 80th Leg., R.S. (2007). In light of the scientific research on brain development outlined in previous sections, particularly the finding that a person’s brain is not fully developed until he or she reaches twenty-five years of age, young offenders up to twenty-five years of age could potentially benefit from the rehabilitative services offered in TYC detention facilities.

253. House Comm. on Corrections, Bill Analysis, Tex. S.B. 103, 80th Leg., R.S. (2007) (amending the Human Resource Code to disallow the practice of placing children younger than fifteen in the same dormitory as youths seventeen years old or older, unless the agency determines that doing so is essential to ensure a child’s safety). The change does not apply to short-term dormitory assignments. *Id.*

254. CHERYL N. TOWNSEND, TEXAS YOUTH COMM’N, FINAL REPORT ON THE PROGRESS & IMPACT OF SENATE BILL 103, 2 (2008), http://www.tyc.state.tx.us/reform/SB103_Final_Report.pdf.

255. Lisa Sandberg, *TYC Blasted for Lacking Safe Housing Policy*, SAN ANTONIO EXPRESS-NEWS, Jan. 1, 2009, available at 2009 WLNR 529258 (describing policy changes at TYC after allegations that four youths were sexually abused by peers in late 2008). In December 2008, TYC director Cherie Townsend ordered that all sex offenders must be segregated from other inmates. *Id.*

256. Nate Blakeslee, *Hidden in Plain Sight*, TEX. OBSERVER, Feb. 23, 2007, at 6, available at 2007 WLNR 5413044 (discussing the facts surrounding the alleged sexual assault of students in a Permian Basin correctional school). The assistant superintendent and principal were both accused of engaging in sexual relations with multiple students over a period of time. *Id.* For a personal narrative from retired Inspector General Randal R. Chance on the problems at the Texas Youth Commission, see RANDAL R. CHANCE, *RAPED BY THE STATE* (1st Book Publishing 2004).

257. Compare House Comm. on Corrections, Bill Analysis, Tex. S.B. 103, 80th Leg., R.S. (2007) (stating the purpose of the reduced age limit is to lower the number of youths

Prosecutors evaluating serious juvenile cases will be less inclined to seek transfer if the prosecutor knows the offending youth can be held by the TYC until the age of twenty-one, instead of nineteen.²⁵⁸ Extending the amount of time the juvenile justice system has to work with youth, both treating and rehabilitating them, will benefit the youth of Texas and the entire state population.²⁵⁹

Any one of the three reforms I propose would benefit the juveniles of this state, the taxpayers, and Texas as a whole; the passage of all three would make a significant difference in transfer rates and would help ensure that malleable minds are getting the necessary counseling and treatment they need.

V. CONCLUSION

The founders of the juvenile justice system originally conceived the system as society's best option for rehabilitating children who broke the law.²⁶⁰ As juvenile courts spread across the nation, the uniform goal was to determine the underlying causes of the child's behavior and provide

who are committed to the TYC), with House Research Organization, Bill Analysis, Tex. S.B. 103, 80th Leg., R.S. (2007) (stating that the reduced age limit would allow TYC to "focus on its core mission of rehabilitating youths" and keep older and younger youths separate).

258. Lisa Sandberg, *More Juvenile Offenders Landing in Actual Prison*, SAN ANTONIO EXPRESS-NEWS, Feb. 23, 2009, at 13A, available at 2009 WLNR 3502417 (identifying the link between the increase in juvenile transfers and the change in Texas law that does not allow the TYC to hold offenders who are over nineteen years of age). Bill Hawkins, a former juvenile prosecutor in Harris County, acknowledges that a major factor in his determination of whether to seek transfer was the amount of time a juvenile could be held by the TYC. *Id.* Hawkins stated, "When the window was shortened, certification became a more viable option in some cases." *Id.*

259. Professor Stephanie Stevens, Supervising Attorney of the Criminal Justice Clinic at St. Mary's University School of Law, agrees that Texas should change the age limit back to twenty-one. She asserts:

Society is rarely benefited by allowing more children to be tried in criminal court and treated like adults. The underlying concept of a separate juvenile system is that children can and should be rehabilitated. Few people are rehabilitated in the adult prison system, but the juvenile system still has a great deal to offer in the way of help for child offenders.

E-mail from Stephanie Stevens, Supervising Attorney of the Criminal Justice Clinic, St. Mary's School of Law, to author (May 18, 2010) (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

260. See David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE 42, 42 (Margaret K. Rosenheim et al. eds., 2002) (outlining the beginnings of the juvenile justice system in Chicago, Illinois).

appropriate treatment so as to prevent future misbehavior.²⁶¹ The discretionary approach in juvenile courts, however, resulted in a relaxed view of due process and rules of procedure.²⁶² The “due process revolution,” which began in the 1960s, forced the courts to examine how the U.S. Constitution applied to children in the context of a juvenile proceeding.²⁶³ Several U.S. Supreme Court decisions extended to juveniles many constitutional protections and due process rights enjoyed by adults,²⁶⁴ but the Court stopped short of equating juveniles and adults.²⁶⁵ Most recently, the Court in *Roper v. Simmons* stated three reasons why juveniles may not be categorized as “among the worst offenders”: (1) the absence of maturity in youth and an underdeveloped understanding of the youth’s own responsibility for his or her actions; (2) the special vulnerability of youth to negative influences, including peer pressure; and (3) the fact that the character of a minor “is not as well formed as that of an adult.”²⁶⁶ The Court’s reasoning informs the discussion of the blameworthiness of youth, and the *Roper* holding should be considered to counsel against placing juveniles into the harsher adult criminal justice system, even when these juveniles commit severe crimes.

The use of transfer increased in the 1980s and the 1990s, when, in response to increased juvenile crime, legislators, including those in Texas, made it easier to transfer juveniles into adult criminal court.²⁶⁷ Across the nation, the use of waiver of jurisdiction over a juvenile increased, and transfer rates rose.²⁶⁸

The detrimental effects of imprisoning juveniles with adults soon became clear. Studies reveal suicide rates for juveniles increase when they are jailed with adults, as do risks of physical and sexual assault, compared

261. DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 14 (Marilyn McShane & Frank P. Williams III, eds., 2001) (describing the theories behind the juvenile justice system).

262. *Id.* at 14–15 (explaining how an individualized approach to juvenile infractions resulted in less rigid due process and procedure rules).

263. *Id.* at 15–16.

264. *See Roper*, 543 U.S. at 551; *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

265. *Bellotti*, 443 U.S. at 634 (clarifying that while adults and minors share many of the same constitutional rights, some rights are clearly distinguishable). An example illustrating this point is the bifurcated criminal court system which tries adults and juvenile differently. *Id.*; *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

266. *Roper*, 543 U.S. at 569–570; *see also* *Graham v. Florida*, 130 S. Ct. 2011 (2010).

267. Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE* 83, 86 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (providing an overview of the history of offense-exclusion from juvenile court).

268. *Id.*

to the rates of those in juvenile correctional facilities.²⁶⁹ Due to the harmful effects of victimization, these juveniles in the adult system are more likely to assault women and children once they are back out in society.²⁷⁰ Furthermore, research shows recidivism is higher among juveniles who are transferred to adult court, and the nature of those crimes is more severe compared to the crimes of individuals who stayed within the juvenile system.²⁷¹ Correspondingly, when youth are incarnated with other convicted criminals during critical stages of their identity development, their sense of belonging and identity in relation to the rest of society is severely warped. It becomes much more difficult for them to fit into mainstream society when released. Finally, brain research provides compelling evidence supporting the traditional belief that the young are less culpable for their actions than are adults.²⁷²

For all of these reasons, Texas must reform state law to account for the inappropriateness of juvenile transfer to adult court, and severely limit its use. The three reforms I propose will help ensure that when juveniles are transferred to stand trial in adult court, the process is fair and just.

First, individualized findings must be required to be written out by the judge during the mandatory transfer hearing. Pre-printed forms with check-boxes do not suffice for such a momentous decision in the life of a juvenile. Judges must be required to write out individualized findings on every child, explaining the reasons why transfer is appropriate. The most recent actions of the Texas Legislature signify recognition of the dangers

269. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM xiv (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf>.

270. RANDALL G. SHELDEN, DELINQUENCY AND JUVENILE JUSTICE IN AMERICAN SOCIETY 344 (2006).

271. Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 183–84 (2007) (citing two independent studies conducted in Florida and Michigan finding that the transfer of juveniles to adult facilities resulted in an increase in violence and frequency of crimes); Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* JUVENILE JUSTICE BULLETIN, Aug. 2008, at 7–8, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>.

272. See Patricia Puritz & Katayoon Majd, *The American Bar Association's Youth at Risk Initiative: Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 473–74; Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816–17 (2003); MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 13 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf>.

of adult prison for juveniles.²⁷³ Requiring written individualized findings will further the stated goal of the Texas Legislature to make the juvenile transfer process as fair as possible.

Secondly, a juvenile must be able to file an interlocutory appeal immediately after a transfer hearing, *before* a criminal conviction. While this appeal is pending, the juveniles must be allowed to remain in juvenile detention facilities, and not transferred to adult jail, where they will likely be kept in solitary confinement for their own protection. To make a juvenile wait until a criminal conviction before appealing an objectionable transfer hearing is simply unconscionable, especially when that juvenile may properly belong in juvenile court. Section 56.01 of the Juvenile Justice Code must be amended to allow for immediate appeal after a certification hearing.

Finally, the TYC must have the authority to hold a juvenile until he or she turns twenty-one years old. Prosecutors who are unwilling to have juveniles locked away for only a few years now request transfer at higher rates, and unfortunately, for many prosecutors and judges, the mandatory judicial transfer hearing has become routine.²⁷⁴ Since the dramatic increases in transfer rates occurred only after the age was lowered, there is good reason to believe the rates will taper off if the age limit is changed back to its prior limit of twenty-one years. Increasing the amount of time the juvenile justice system has to work with youth, both treating and rehabilitating, will benefit the youth of Texas and the entire state population.

More faith must be put into the Texas Youth Commission and its ability to rehabilitate youth. The Capital Offender Program (COP), as one of the most successful programs in the country, shows enormous promise.²⁷⁵ The Texas legislature must continue to focus on enhancing the rehabilitative services offered by the TYC, and direct resources toward helping youth, rather than waiting to spend those resources on juveniles who re-offend after they have been confined with adults. Transferring youth who commit crimes to the adult system is the same as telling those youth that

273. House Research Organization, Bill Analysis, Tex. S.B. 518, 81st Leg., R.S. (2009).

274. Chris Vogel, *For Their Own Good*, HOUSTON PRESS, May 28, 2009, available at 2009 WLNR 10693190.

275. MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 66 (2009), <http://www.utexas.edu/lbj/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf> (citing a recent COP study "show[ing] an overall 55% reduction in re-incarceration for any offense and 43% reduction in re-incarceration for felonies"). Three years after release from the program, only 15.2% of youths reoffend; as compared to 35.6% of young capital offenders who do not attend such a program. *Id.*

society has given up on them, that they are unsalvageable, and that they are not ever expected to be positive and productive members of society. Sending kids into adult prisons is the antithesis of the principles the juvenile justice system was founded upon. Texas law must be reformed to provide treatment, education, and rehabilitation to youth who commit crimes, thus fulfilling the promise of juvenile justice.

